

C. X

AN
EXPLANATION
OF THE
PRACTICE OF LAW:

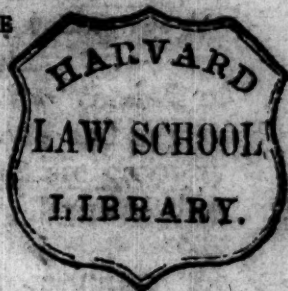
CONTAINING THE
ELEMENTS OF SPECIAL PLEADING,

REDUCED TO THE COMPREHENSION OF EVERY ONE;

ALSO,
ELEMENTS OF A PLAN FOR A REFORM:

SHOWING

THAT THE PLAINTIFF'S COSTS IN A COMMON
ACTION, WHICH AT PRESENT AMOUNT
TO FROM 25 TO 35*l.* NEED NOT
EXCEED 10*l.* AND THOSE OF THE
DEFENDANT, WHICH ARE
NOW FROM 12 TO 20*l.*
NEED NOT EXCEED 6*l.*



*Déjà de la carrière
L' auguste vérité vient m'ouvrir la barrière.*

VOLTAIRE.

BY JOHN FREDERIC SCHIEFER, Esq.

MEMBER OF THE HON. SOCIETY OF LINCOLN'S INN.

DUBLIN:

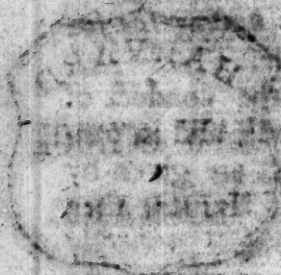
PRINTED BY J. STOCKDALE,

FOR MESSRS. E. LYNCH, P. BYRNE, J. MOORE, W.
JONES, R. M'ALLISTER, H. WATTS, AND J. RICE.

1793.

S
WK
991
SCH

TX
5332
D.E.L.



INTRODUCTION.

AS laws were never intended for the partial advantage of the few, but for the general good of the whole, it is not for lawyers alone, but for the public at large that I have written: not but I flatter myself both will reap ample advantage. The fault almost universally found with legal publications is, their being chiefly designed for gentlemen of the profession; and as such their authors have often recommended them; exactly as common attornies make a boast, that they cannot talk to any one who is not a lawyer: *As though it were a merit in having the faculty of rendering one's self unintelligible.*

Law being calculated to regulate the conduct of all, so by all it ought to be understood; and in particular, as all verdicts in matters of fact are given by juries composed not of lawyers, but of laymen, they surely, in preference to all others, ought perfectly to understand every part of the proceedings: for what a pretty sermon must a parson make, who knows nothing of the text on which he is commenting!

A judgment given in a court of justice is nothing more than the just conclusion resulting from the premises. And those premises are, first, the record; and secondly, the evidence to be applied to that record: by comparing, therefore, the testimony of the witnesses, with the written altercations (1) of the

(1) These consist of the declaration, plea, &c. commonly called the pleadings.

plaintiff and defendant themselves, we become able, and by no other means can we become so, of judging who is right, and knowing who is wrong.

I flatter myself, therefore, that I shall render a considerable service to my country, should I be so happy as to snatch from obscurity that which has hitherto been confined to the knowledge, not of the profession at large, but to the knowledge of a very small number of that profession; I mean the science, or rather *art of special pleading*: which, says Judge *Blackstone*, has been often perverted to the worst of purposes (2). In order then properly to accomplish this desirable end, I have not confined myself to special pleading alone; I have made it but one part of my work; for to the due understanding of it, it is really necessary, that a person should well understand the practice of the courts in every respect; and, indeed, without the knowledge of practice, it is impossible to be well versed in theory; but these two, taken together, cannot fail in a short time rendering the student fully competent to every part of his profession. But more than that, I will undertake to pledge myself, that this publication is such, that with one month's application any private gentleman may acquire a knowledge of law, at least equal to that of the generality of those who have served clerkships to attornies, or spent two years of their lives in the offices of special pleaders. And the utility of such knowledge, whatever may be a man's rank, character, calling, or situation in life, few will attempt to doubt.

I am not however, so absurd as to assert, that all the learning and intelligence contained in the many volumes written on that subject, are contained in this small publication; but I hope, with regard to those

(2) *Comm.* Vol. III. 306.

INTRODUCTION.

mighty cargoes, which are always so troublesome to unpack, this work will form a magnet in the understanding of its readers, to attract to its surface every particle of matter proper to unite with it, so as to enable them to separate the useful and good from the useless and bad. Those who have a little studied law, must be convinced how much some polar guide has hitherto been wanting to assist the student in his practical researches.

Judge *Blackstone*, it is true, has enlightened not only the profession, but as well the nation at large with his *theory*, but the *practical* gentlemen, with regard to their branch, they have confined it hitherto within the gloomy cave of darkness; from which, should I be so happy as to draw it forth, either by this, or by any other work that may be the future produce of my endeavours to serve my country, I shall deem myself gratified in the highest extreme. It would add, additional pleasure to public approbation!

Independent of the great advantage resulting from a knowledge of the means, whereby our liberties and fortunes may be the easier protected (3), even in *common conversation*, to cultivate the arts of social life, a knowledge of the primitive outlines of proceedings in our courts of justice is excessively useful; because it regulates the politeness of our discourse, and teaches us to discuss not only the most trivial, but as well the most material things in life. For by enabling us with greater facility to reduce our subject into proper parts, we become careful and modest in our assertions, lest we take upon ourselves the

(3) For I write not of life, inasmuch as this treatise is not intended to interfere with the criminal, but to be confined wholly to the law in civil cases; except indeed *very briefly* to touch on such criminal suits, as are intimately blended with those of a civil nature.

proof

proof of those things we are afterwards unable to sustain; consequently we are taught to arrange our propositions into affirmative and negative, and to know that what our adversary advances he is *bound* to prove; and that what we advance ourselves we *are equally liable to establish*; agreeable to that excellent rule, that *either party must prove his own averments*. The operation therefore of the general issue, and its distinction from special plea, is well worthy the attention of the philosophical reader: for in logic you have only *ethics* in miniature, but in law you have them as large as life. The accomplishment of discourse, is the grand characteristic of a free people; it is the distinction in short, between liberty and slavery; it is the touchstone by which our rights are determined; for when the tide of eloquence is low in a nation, the streams of freedom cannot flow. It is the gift of speech which distinguishes man from the brute creation; the cultivation of it then, is the cultivation of nothing less, than the human soul! Deprived of the free exercise of communicating our ideas, we are precipitated beneath ourselves; existing only to know, without the power to utter, our misfortunes.

The advantages, therefore, resulting from eloquence, like those arising from the Liberty of the press, *may be detrimental no doubt to the few, whose vices are thereby exposed*; but to the virtuous they give a lasting support, by cultivating the human genius in general, and teaching mankind at large to shut their ears against calumny, and thereby to lessen its baneful consequences, by the most effectual of all other means, that of discouraging its use by reflecting an odium on the tell-tale. Freedom of debate fits the mind for proper investigation; it gives a microscope to the tongue, and a telescope to the understanding; so that in private as in public, the fact being freely discussed on both sides, the verdict is
given

INTRODUCTION.

vii

given in favour of him who deserved it; and honour and applause may be yet reserved to the advocate of one party, without depreciating the good intention of him who pleaded for the other.

I hope the reader will find, that in the composition of this work I have throughout the whole reasoned so fairly, that whenever I have found any thing excellent, I have applauded it; and on the contrary, have pointed out the improper. But the nature of the work is first to shew, what the present system of practice is; and that being perfectly understood, the reader will judge for himself whether it ought or ought not to be amended. Should he in that particular agree with me, I beg leave to offer to his consideration the elements of the plan for that purpose, forming the third part of this work.

In favour of the *old system*, I know there will be *many advocates*; and this we must expect, *since so many live by the abuses of it.*

You will be told, as you have often been told, *sicut alias, sicut pluries*; that the present system was established by the wisdom of our ancestors. Ask those persons wherein that wisdom consists, when a man is obliged to risk 30, 40, nay sometimes 50, 60, or 70*l.* and more, to recover forty shillings? *Those that argue from the wisdom of their ancestors have very little wisdom of their own.* they may add indeed, in a strain emphatic, "our forefathers have bled for this system!" Ah! it may be easily answered, "and they are not the first who have bled for what they did not understand:" witness those who died martyrs for religion! but they must be more stupid still, who could die martyrs for special pleading!!

You will be further told, it has not only antiquity for its sanction, but as well the improvement and concurrence of ages. But I'll answer this too. That laws like liquors improve by time, is a proposition I don't mean to deny; but then, like them,

by

by time and accident, the best are liable to be corrupted: for when the acetous fermentation takes place, the tartar becomes deposited, and the most generous wine is thus converted into sour vinegar. Since then the works of nature are so liable, nay so certain to decay, shall man presume to call his frailties wise, and attribute that incorruption to them, which is even denied to himself? It is because all, even the strongest things have but a certain duration, that nature has furnished a succession of fruits to supply our perpetual wants. Old mistakes must therefore give place to new improvements, and these in their turn must yield to future cultivation. The earth itself was not designed to stand still, but to perform her various revolutions. Shall stubborn tyranny then resist the attractive force of mild, generous, and benign reason; or shall she still exist the *menstruum* of all human happiness? Forbid it, Heaven!

It is far more wise and prudent to examine the state of things ere they are too far gone, lest by some untoward circumstance we should be deprived of the opportunity. The mother earth when debilitated must be restored with manure; but if the compost be not laid upon the land while yet abounding in mucilage, the nourishment of plants, the soil receives no benefit; for the second stage of putrefaction having taken place, the salts are struck, and these, though poisonous, cannot be decomposed.

Thus too frequently it happens when people apply to attornies to recover their debts; instead of giving nourishment to their property, they give poison to their fortunes.

Law is to the social, what blood is to the animal body; when become inspissated and glutinous it produces boils in the patient, which can only be cured by reducing the blood to its due consistency, thereby to restore it to its proper circulation. Thus our laws,
however

INTRODUCTION. ix

however just in their principles, or *ultimately* impartial in their administration, yet owing to the circumlocutive mode of proceeding in them, their application is attended with such an heavy expence, that few are the individuals who can bear the ponderous weight of a well fought litigation.

You will be told my objections are not to the substance, but to the form; I own it; because *form in this case makes all the odds*. The best medicines may prove abortive if inartificially applied.

Form comes from the *Latin* word *forma*, which signifies beauty, and which we frequently express in *English* by the word *uniformity*, being opposed to *deformity*; but will any one attempt to say that there is any beauty in a declaration which, seven, eight, or nine times repeats the cause of action, and neither time exactly as it is? Surely we ought to call this a deformed, not an uniform composition.

*Monstrum horrendum, informe, ingens, cui lumen
ademptum*

A horrid mis-shapen monster deprived of light; for who can discover in a declaration for a tradesman's bill more than that the defendant is indebted to his plaintiff in his way of trade; but the quantity of the goods, and the price at which they ought to be charged, the two main questions to be determined in the suit; you are wholly left to guess.

Did the heavy expence of this roundabout way of going to work fall only on the debtor unwilling to pay, it would not vex me; but when we see such enormous charges daily alighting on the injured creditor, one has true cause to grieve! For all must confess, owing to the darkness of the pleadings, how liable declarations are to be demurred to, and how liable are plaintiffs to be non-suited; and this latter, although they pay all costs, is yet a *favour*; because
after

K INTRODUCTION.

after a nonsuit a man may bring his action again; but after a verdict he cannot, unless the court will grant a new trial. (4)

Few, however, who have lost their suits upon a point of law, though convinced they were right in point of fact, after having paid 25 or 30*l.* to their own attorney, and about half that sum to that of their adversary, will find themselves disposed to weather another storm.

When we see the tender mother, what through grief, and what through the privation of proper food, dejected in spirits, and unable to secrete that nourishment in her breasts necessary to the sustenance of her infant offspring; and when we see the honest father, who can pay part, but cannot pay all the rapacity of the law requires of him, dragged to a jail, precipitated into a confinement of despair; torn from his kind and beautiful partner, exactest work of heaven, whose lovely cheeks are bathed with torrents of tears rushing from her eyes cast down, by poignant feeling for her indulgent husband; and which she can only raise to behold a family of young children, the dew drops of the parent's affection, deprived of their father's labour for no other crime perhaps than that of suing for his own; or to view in misery that indulgent patron of her charms hurried off to a dungeon of wretchedness, want and despair. And when we enquire into the cause of all this; it is that an honest and worthy citizen has lost his suit, from no other cause than the intricacy of those proceedings, that even his lawyers did not understand! Beholding these tragedies, have we not cause to repine? Oh, horrid reflection!

Thou who art the guardian angel of the distressed, grant that some worthy senator, either of the one or the other house of parliament, may se-

(4) See this head in the Alphabetical Chapter.

INTRODUCTION.

cond and improve my labours, by bringing in a bill to shorten the proceedings, and thereby reduce the heavy expence attendant on the administration of justice!

To him do I dedicate my work!

It is not what law is in theory, nor what people imagine it to be, but *what it is in practice and in fact*, that is the subject worthy of the philosopher's enquiry. Those who have read *Blackstone* have been often charmed no doubt, with what a man *can* do, and with what he *cannot* do, and with the remedy pointed out for every evil; but have they enquired what are the consequences attendant on those remedies? Or rather, what are the remedies themselves? Do they apply the healing balsam to the wounded part, or do they torment the patient with the burning cautery? Do they raise the drooping spirits, or distract the injured brain?

"One great obstacle to the improvement of arts, (says Mr. Chambers in his *Cyclopædia*) (5) has been the neglect of practice in speculative men, and the ignorance and contempt of theory in mere practical men. What chimeras and absurdities the neglect of experience and practice has produced, need not be mentioned; the mischiefs arising from a neglect of theory are not so obvious, yet certainly it retards the progress of arts. All *invention or improvement* must be either *casual or rational*, including analogy or inference from similar cases, under the term *rational*."

And yet you hear the ignorant part of mankind echoing perpetually, "innovations are dangerous." But if when the loadstone was first applied to navigation, it had been objected to by the seamen of those days as an innovation on coasting, *Vasco de*

INTRODUCTION.

Gama had never discovered the East, nor *Columbus* the West Indies? Oh, *Britain*, where had been thy pride; or where thy glory then to boast?

Or when printing was first invented, had it been suppressed on the ground of the injury which such an art might have done to hackney writers, for that by the new mode one man could do more work than a thousand could by the old, oh, literature, where had been thy laurels? Or mankind, where thy liberty?

Shall it therefore be objected that, were the proceedings at law shortened, so as to render them more intelligible and less expensive, it would hurt the lawyers? Barbarous idea! *As though laws were invented to fleece, and not to protect mankind.*

But perhaps the artful argument will be made use of, that were law cheaper, it would not be worth any man's while to follow the profession. I need only observe, with regard to that, that by the plan proposed in the last part of this work, the profit allowed to the attorney would even then be 80 per cent. or rather 400 per cent. for profit should not be reckoned as the proportion of the sum returned; but as the balance gained upon the sum laid out. Therefore, so long as 1*l.* can be turned into 5*l.* people will never be wanting, and those too of reputation, who will gladly follow such an employment. And with regard to the fees of counsel, they would remain exactly as they do now; therefore the gentlemen of the bar could have no reason to complain.

But it may be urged in favour of the attornies; that the return would not be so large, as the same cause in which the attorney now returns 30, 40, or 50*l.* he would then only return 8 or 10*l.* in. But those who reason that way will be mistaken; for the consumption is always greater when the price of the commodity is less. It may be urged then, that litigation would be increased, and with it its evils

in proportion; this too I negative, for people would then only have law as they could afford it, they would not be liable therefore to the heavy bills that now come upon them unexpectedly: but by the simplicity of the proceedings, would be better able to judge of their expence before they began; and in case of failure as the costs would be less, their circumstances would the readier recruit the loss. Whereas at present, owing to the heavy charges, people are often thrown into a jail, by having those actions non-prossed, in which had they money to succeed, they would otherwise recover verdicts, and thus by being paid themselves, would be able to pay others; but not having bottom to resist the rocks of imposition on every side, are at length stranded on that shore, from which they expected an hospitable reception! Thus for no other crime than that of a man's suing for his own, he may be prevented from recruiting his circumstances ever after; or perhaps to pay his attorney, must frequently borrow money at heavy interest to stop his proceeding against him. So that as things now stand, weight thus heaped upon weight, no force can resist, nor fortune recruit!

We all well know that the circumstances of men can bear by degrees amazing weights, which if applied at once, would inevitably crush them for ever. A man whose income earned by his trade, is 2 or 300*l.* a year, may pay at the rate of 20*l.* a year, and never be hurt, even he shall not feel the loss; but bring him in bills for a hundred, and if not paid in four days time, a sale is made of his stock in trade, which is the whole he possesses; the rest of his creditors fall on him, and what resource has he left but a jail. But even here the mischief does not cease, what support has his family but a parish; which being so encumbered, cannot fail raising the poor-rates, and that to an enormous height?

By

By whom then must these rates be paid, not by the poor, but by the rich? though I make no doubt, but many who are rated are poor enough themselves!

Many I know will urge, that all these misfortunes arise *not* from the system, but from the men who abuse that system; but to that silly argument it may be easily answered, *bad is that system which is so susceptible of abuse, the road to vice and corruption must be easy, and the shelters for rapacity, fraud and deceit, numerous and strong.* Render your system more intelligible, and it will be less abused; instead of rendering it to the interest of your lawyers to act with secrecy, render it to their interest to practise with candour; render it to their interest to do their duty to their clients, by depriving them of the means of taking the advantage of them; then will attornies become what they were designed to be, the assistants to, not the impediments of their clients' causes.

Many regulations have been made, and many more attempted to be made respecting attornies; but as to any good effects resulting from them, I very much doubt. Some have said, let the articles be stamped with a 50*l.* stamp; but he whose articles were stamped with a 50*l.* stamp, could impose upon his client, as well as he whose articles were only stamped with a 50*s.* and perhaps more so, because he would have more authority so to do, his grandeur would protect him. The more the pettifogger is enabled to brag of the money his articles or his admission cost him, the better excuse he has for his heavy charges. *Has any advantage arisen to the public from the licence that attornies are obliged to take out?* Certainly not! their fees were complained of, consequently they were deemed proper objects of taxation; but would not the reduction of costs have been coming nearer to the standard of justice?

INTRODUCTION.

19

justice? the produce of the tax is trifling, and upon the *honourable* part of the profession, no doubt it bears extremely hard.

Some persons will tell you, that the gentlemen of the bar are not sufficiently qualified; why, in short, they are like every other body of men, some are better adapted than others for the particular profession they follow; but in reality, owing to the system being so confined, nine tenths of the barristers have no opportunity to shew their talents. I do not mean to assert, that every man bred to the bar is a man of talents; but that it is wrong in people to select for their children employments, for which nature seems not to have fitted them, yet it is a weakness that is very excusable; it is parental fondness! They forget however, that life is a masquerade, in which he who chooses a character he is unable to sustain, renders himself not happy, but miserable. The natural talent of the youth should be consulted, in preference to the plan laid down for his education; for in fact, as to particular plans of instruction, the native genius is oftener injured than benefited by them, for that mode of cultivation that is suited to one mind, is often destructive to another, as different seeds succeed in different soils. "Therefore to cultivate lands for those plants, which nature seems to have denied them the powers to nourish, is not forcing, is not assisting; but opposing the sublime decrees of providence."

- " There are who fondly studious of increase
- " Rich foreign mould, on their ill-natured land
- " Induce laborious; and with fattening muck
- " Besmear the roots in vain: the nursling grove
- " Seems fair awhile, cherished with foster earth;
- " But when the alien compost is exhaust,
- " Its native poverty again prevails.

" PALLAS."

It

It is but too true, that you frequently find lawyers either a composition of literary ordure, or a mixture of legal quibble, and short cut phrases: but the barrister who possesses a native genius may boast a profession, which ranks foremost of all others, in bringing into action the most noble principle of the human soul, "that of man defending his fellow creature, and conquering his adversary; not by force, but by reason; not by weapons of destruction, but by means of persuasion."

I do not mean however to infer that an end should be put to the arts of cultivation, for nothing is good in a rude state; and upon man more than on any other animal, depends the increasing the original power, as well of mind as of body; but it must be allowed, that the original power is much greater in some, than in others. Nor is the compass of judgment and memory in all directed to the same point, in some it varies more than in others. It is for this reason that all should endeavour to cultivate their understandings as much as possible; and the only effectual mode of doing this, is to travel that road which nature seems to have pointed out for us, as the shortest and readiest way to make the greatest progress in the journey of truth. I think it is the *Spectator* who says, but it matters not, I have him not at my elbow; that 'many a plough-boy would make a good chancellor, and many a chancellor a good plough-boy.' No confined plan will ever make a lawyer, who ought surely to be the most liberal of men. It is by assisting the natural cure, that we heal the disease, by opposing it we kill the patient: and this easily accounts for the circumstance of some acquiring more knowledge in one year, than others do in ten.

What then, it may be asked, is the recipe to make a lawyer? Why that he should first acquire a general knowledge: in a word, he should be a good
good

good philosopher. "For it is by concentrating various rays of light into one focus, that we acquire one brilliant point."

But this perhaps will be better illustrated by the fable of the lawyer and philosopher, each of whom was to explain his own particular proposition to an audience of various characters: the lawyer chose a legal subject, and the philosopher a physical one.

The audience consisted of a bench of *lawyers*, a bench of *doctors*, a bench of *Parsons*, a bench of *pedants*, a bench of *gentlemen*, and a bench of *tradesmen*.

The lawyer began his cause first, choosing for his subject the pleadings in trespass.

He observed, that, "In trespass, the declaration must be direct and positive, and therefore if the plaintiff declares, That whereas defendant, &c. it is bad; for nothing is directly affirmed. *Comyns* 314. That is if the defendant demurs.

"So if the plaintiff declares, *quare cum*, &c. *R. Salk.* 636. But *quod cum* is well enough after verdict, though it might be bad upon demurrer. *1 Wils.* 99. *Quod cum* is well on a special demurrer, where the declaration is set forth in the writ. *2 Wils.* 203, *i. e.* in *C. B.* or in *B. R.* by original.

"In trespass *nec non de eo quod*, &c. after a *quod cum*, is a positive charge. *Strange*, 651. *2 Lord Raym.* 1413. *2 Morgan's Vade Mecum*, 233."

"I don't talk to all those who hear me, continued the lawyer, but only to those who understand me."

Sure enough, none but the bench of his own profession did understand him: and they wanted the powers, *per quod*, to make other people understand. For the president of the lawyers first addressed himself to the clergy, out of respect to their calling; but these gentlemen being so much accustomed to the language of the courts above, declared although

they had learned the vulgar tongue, they did not understand the harangue of the legal professor, yet very fairly owned it might contain some latent spirit, which they could not distil: for which reason they begged leave to observe, "that their judgment was immaterial," yet they owned as far as their judgment could go, they had heard nothing fall from the legal professor that the philosopher ought to be required to answer; for his harangue altogether did not appear to them to contain one rational idea. However, they submitted his discourse both as to matter and spirit to the other benches.

The rest of the benches seemed perfectly of the same opinion, and consequently, the lawyer was declared to be nonsuited.

The philosopher was then permitted to explain his proposition, which was that of the force of the muscles.

He first addressed himself to the bench of doctors, by observing that "in nature, nothing so much commanded our admiration as the amazing strength of the muscles. Those of the calf of one leg frequently lifting the whole weight of the body, as in walking for example. I do not use technical terms, *continued he*, because I wish to be intelligible to my audience at large." The doctors politely bowing, assented to the philosopher's proposition. *He then turned to the bench of traders.*

"Gentlemen," he continued, "the muscles are those powers which move the bones, and the bones are the levers to the body; but what is yet more extraordinary, they are all levers of the third degree. Why they should be so, is not for me to enquire; as no doubt, what the Almighty has decreed in his works must be right." The clergy too assented to this proposition, the private gentlemen

gentlemen were of opinion with the traders, for they declared the landed and the trading interest ought never to be separated. The lawyers knew better than to negative the facts, but they demurred, not specially, but generally, *as they gave no reasons*. As to the pedants they supported the lawyers, but all the benches agreed in this, that the legal professor ought to be heard on the other side; on the ground, "that *as the philosopher had used no technical terms, nor attempted to puzzle the question, any liberal bred man might understand him*; for the contrary reason they had non-suited the lawyer, yet for all that, they did not mean to preclude him his defence in the present instance.

The lawyer observed, "That under the wise direction of the bench of his own profession, and that of the pedants, he should act: he knew too well his duty, to resist any thing that fell from such high authority. The opinion of so much learning and wisdom, he should ever esteem; conscious of his own inability to disprove what they did not deny. I am under, said he, many obligations to the learned bench of my own profession, for demurring without assigning reasons: I see their wisdom! They have thereby given me an opportunity of stating such general objections, as may in some little degree relieve me from being beat, at least perfectly follow.

"My objections then are directly in the teeth of the philosopher's language. (*The pedants smiled.*) "To a noun in the singular, he used a verb in the plural: and after a conditional conjunction, he used the indicative mood." The pedants immediately called out that the lawyer had gained the day, and the lawyers thought their demurrer completely established: but the other benches observed, that this being fresh matter, the philosopher was certainly entitled to reply; and the votes of the benches

benches appearing four to two in favour of this opinion; the philosopher was called on for his replication.

"The noun," said "he, that I used was *bench*, which is a noun of multitude, I applied it to the bench of doctors, as consulting of many persons. *Bench* therefore, will either bear the verb in the plural or in the singular; but I preferred the former, because *words* are but the articulate signs of our ideas, and *idea* is a Greek word, signifying neither more nor less, than the image of something formed in the imagination; for in like manner, as objects of vision are painted on the retina, so no doubt are those of reflexion painted on the seat of the understanding. To render our ideas just therefore, they should correspond to the objects offered to our senses; the bench of doctors I perceived to consist of many persons, and therefore I could do no other than imbibe a plural idea of them; but as to the bench of pedants, I perceive I must entertain a singular notion of it, and I hope it will ever be placed in the neuter gender. As to the bench of lawyers, though they have assigned no reason for demurring, yet I trust they will see the force of my reply. Nouns of multitude then, require the verb in the plural: and where the indulgence of language permits the singular, it is because the plural would be ungrateful to the ear; for the ear is the judge of music, and music is the art of imitating the harmony of nature.

"With regard to the objection respecting the mood, if I recollect right, I made no such mistake. I am perfectly sensible that after every conditional sign, we ought to use the conditional mood, otherwise we confound the distinction between the contingent and the certain. Therefore, if I committed that error, I acknowledge I was wrong; but in such case, I might at least be permitted

“mitted to justify myself upon *precedent*, and for
 “that precedent I need go no further than the
 “learned professor’s own speech, when he attempt-
 “ed to demonstrate the pleadings in trespass, and
 “wherein he quoted so many other *learned* autho-
 “rities. He made twice use of, “*if he declares,*”
 “instead of saying *if he declare*. I presume there-
 “fore, had I committed that mistake, *these pre-*
 “cedents would have justified the error, which upon
 “principle could not have been defended.”

“But, continued the philosopher, is there any
 “thing either ridiculous or contemptible, nay even
 “base, vile, mean or detestable, but what may
 “be defended on precedent?” “Did not Pepin the
 “dwarf, surnamed the Short, afterwards King of
 “France, while he was yet prime minister to Chil-
 “deric the Third, whose throne he usurped, apply
 “to the Pope to know who was the true king, “he
 “who had the power, or he who had *only* the
 “name?” and did not his Holiness decide in his fa-
 “vour? Did not also his same *hypocritical* Holiness,
 “afterwards anoint Pepin king; and was not this
 “usurper the first anointed king in Europe? And
 “did not the same Pepin afterwards receive the
 “sacred unction from St. Boniface, to use the lan-
 “guage of those days, the apostle, by some called
 “the impostor of all Germany. And when Lewis
 “the Feeble, the son of Charlemagne, and grand-
 “son of Pepin, was taken prisoner by his sons,
 “who had rebelled against him; did not the king
 “with his face to the earth, and lying on sack-
 “cloth in the cathedral of Notre Dame, at Soissons,
 “ask a public penance? *Precedents upon these oc-*
 “casions are always quoted: this matter was there-
 “fore authorised by a certain King of the Visigoths,
 “named VAMBA, who reigned in Spain in 681,
 “growing weak and childish, having had public pe-
 “nance inflicted on him by a council held at Toledo;
 “after

“ after which he retired to a cloister, and his son
 “ HEVIQUEZ succeeded him, who acknowledged
 “ he held the crown of the bishops.”

“ Surely therefore, if transactions so base and
 “ abominable could be justified by precedent, I
 “ might at least be permitted to justify on prece-
 “ dent an error in grammar.” “ But to take a
 “ precedent from home; did not one of your own
 “ sacred majesties, (6) cause a bishop’s (7) brains
 “ to be beat out, before the altar of *St. Benedict*?
 “ It is true, no precedent was necessary to be quoted
 “ for a king’s beating out the brains of a bishop, any
 “ more than for a bishop’s beating out those of a
 “ king; for every day’s experience furnishes in-
 “ stances of the *holy* falling on the sacred, and the
 “ sacred on the *holy*. But his *sacred* majesty who had
 “ beat out the brains of the bishop, (8) being willing
 “ to do penance for the crime, *wanted a precedent*;
 “ when those I have just now quoted, were quoted
 “ upon the occasion. His *sacred* majesty accordingly
 “ went to *Canterbury*, and when within sight of
 “ the church, he alighted from his horse, walked
 “ barefoot towards the town, and prostrated himself
 “ before the shrine of the saint, *i. e.* before that of
 “ the bishop, for a *dead bishop* is always a *Saint*; or
 “ at least, dead bishops were so deemed in those
 “ days.” “ I beg pardon of my audience, *observed*
 “ the philosopher, who (I am afraid) will think that
 “ I have most shamefully digressed; but they will
 “ pardon me when they recollect, that I did not
 “ mean to shelter myself under precedent, without
 “ first stating what precedent was. I now therefore
 “ submit my case to my judges.

(6) *Henry the Second.*

(7) *St. Thomas à Becket, who was killed at Canterbury.*

(8) I am not sure if he were not an *arch* one, but the intel-
 ligent reader, who is a better historian than myself will set
 that right.

When the philosopher had finished his reply, the bench of lawyers behaved very liberal indeed, for they unanimously agreed to wave their demurrer; but the pedants had yet many objections to make to the philosopher's language, though they were soon over-ruled by the other benches, who declared that all language had been improved by philosophy, but none was ever mended by pedantry. Pedantry had ever retarded the progress of genius; and in language, as in law, those rules must always be best that are least arbitrary: because *the rational rule will every where meet with subjects ready to obey it; while the arbitrary one will every where meet with those ready to resist it.* In short, the prize was voted to the philosopher by a majority of five benches to one; none but the pedants standing out.

The philosopher then returned thanks for the honour conferred upon him, though he said he did not mean to applaud himself for the subject he had selected. It had a much higher author to boast, whom we could not too much admire, when we contemplated the power of muscular motion; but of all the muscles together, added he, "no muscles have the force of the muscles of the jaws." (9)

It need hardly be observed, *that had the lawyer been a philosopher*, he would have chosen a very different part of his own science to have enlarged upon. It being, however, demonstrated that the man ought to be a philosopher, much room cannot be left to doubt but that the system ought to be philosophical. Whether it be so or not will now be the object of our enquiry; in order to facilitate which, the plan that I have adopted is, first, to consider the va-

(9) It is remarkable, that though the muscles of the lower jaw do not weigh above 1lb. altogether, yet they are capable of overcoming a resistance equal to 534lb. See *Borelli de Motu Animalium*.

rious part of the common action *not* bailable, without interfering with any other subject; and in order to demonstrate the same more clearly, the proceedings on the part of the *plaintiff* are arranged on the *one* page, and those on the part of the *defendant* on the *other*, agreeable to the double entry. Why I began with the action *not* bailable is, because it is the most simple and least complicated; for simple ideas must be imbibed before complex ones can be acquired. And I chose to prefer for my particular example the action of *assumpsit*, in preference to any other, because that of all others is the most universal, and consequently that in which the major part of my readers will find themselves principally interested. After having dissected the several proceedings in it, from the first process to the writ of execution, and demonstrated the mode of trying an issue of fact, I have next proceeded to shew the nature of demurrer on determining an issue of law; which latter being much more difficult than the former, I have purposely written in a lively strain, to prevent that *ennui* which the generality of my readers must otherwise have suffered, from a more technical recital; endeavouring, nevertheless, to be as accurate with regard to the routine of practice, as if the relation had had less levity in its composition. But I had as well another object in view, in writing the chapter on Demurrer after the manner that I have; namely, to bring to the readers recollection, that to acquire a proper knowledge of the practice of law, we ought not only to consider the nature of the several proceedings, but as well either the misfortunes or follies of the parties before they begin them; their various anxieties while they are in continuance; and the ultimate consequences attendant upon the determination of the suit. "In a word, that you should look into the secret cabinet of those you employ,

Here

INTRODUCTION.

xxxv

Here then are objects well worthy the consideration of the philosophic and philanthropic mind; these are considerations which ought truly to interest us in the reduction of the costs: we should reflect how many and numerous are the calamities naturally attendant on litigation; we should reflect then how cruel it is to increase them, and how praise-worthy to diminish them. These reflections too will teach us before we bring actions, to consider well whether we have, in point of *moral rectitude*, a true and just cause of complaint; lest that in our legal pursuits we render ourselves the *dupes* of that *misanthropy*, which delights only in the miseries of the human race.

The names of *Souse* and *Tongue*, *Quileworthby* and *Pouncepowder*, *Quibbleprop* and *Thickpole*, the reader will do me the justice to believe, are not aimed at any particular persons; but like characters on the stage, which are merely introduced for the instruction and entertainment of the audience, and not meant to calumniate private individuals. The late celebrated Mr. *Fielding*, in his *Joseph Andrews* (10), observes, "the distinction between the satirist and the libeller is, that the one speaks of the *species*, the other of the individual: the one holds the glass to thousands in their closets, that they may contemplate the deformity, and thereby endeavour to reduce it; and thus by private mortification avoid public shame. Thus the satirist privately corrects the fault like a parent, while the libeller mangles the individual like an executioner."

The reader being acquainted with the distinction between issue and demurrer, I have next proceeded to shew the nature of arrest; thereby demonstrating the difference between the action *bailable*, and that *not bailable*; and therein have suffered judgment to go by

default, to shew the difference between a verdict obtained in court, and damages recovered on inquiry.

The next chapter treats of the proceedings in error, wherein is pointed out their affinity with the nature of demurrer. And lastly is shewn the mode of proceeding against, as well the bail to the sheriff, as those to the action. All which, taken together, forms what usually arises in a common litigation carried so far, and to which length the parties may if they choose proceed; the collateral matter arising being chiefly motions in court according to circumstances, the nature of which will be found under the title *Rule*, in the Alphabetical Chapter.

To this chapter, in short, the reader will please to refer for every thing not contained in any other part of the work; such as proceedings by *original*, by *clausum fregit*, those against *privileged* persons, as *peers*, *members of parliament*, *attornies*, and other *officers* of the courts; the proceedings against *prisoners*, &c. &c.

The second part consists of the elements of special pleading, not the precedents at length, but the substance of them; the form the reader will be sufficiently master of, by a due attention to the first part. These elements, I flatter myself, will not be less instructive to the reader, than useful to the practitioner: to the latter they will serve as an hydrometer, by the application of which he may try the proof of the pleadings he receives, by at once discovering their deficiencies; and in like manner he may determine the goodness of those of his own composition.

This part concludes with the alphabetical chapter, of which we just now hinted the heads. In it every subject is not treated so fully as those in the former part of the work, by reason that it was by no means necessary; for the reader being so far advanced

INTRODUCTION. xxvii

vanced, I did not think it proper to offend him with repetitions, or fatigue him with *minutiæ*, which he can much better discover himself, than any commentator can explain to him. Yet, upon the whole, there is nothing omitted that was necessary to be brought in aid to render the present practice of the courts of *K. B.* and *C. P.* intelligible even to those, who before knew no more of law than the name.

The third part consists of a plan for a reform in the present proceedings, in order to lessen the expence; humbly submitted to the consideration of those who are much more able to judge of the matter than myself.

John Frederic Schieffer,

May 7, 1792.

N. B. The reader will please to observe, that having read p. 2. he will proceed directly to p. 4. as that and *not* p. 3. continues the subject with regard to the plaintiff; and having exhausted all plaintiff's pages in that chapter, he will then return and take those of the defendant in the same order. Thus he has the road marked out for the plaintiff on the one page, and that for the defendant opposed to it on the other.

ADVERTISEMENT.

PRACTICE is in law, what EXPERIMENT is in philosophy, without the knowledge of which, we cannot assure ourselves of the truth of any one single proposition. It is in law, as in every other profession; THEORY ever leaves a bandage on the eyes, which nothing but a practical knowledge can remove. Therefore not only to the LAWYER, but to the SENATOR, the MAGISTRATE, the private GENTLEMAN, and the TRADER, will this work be found *equally* useful.

I N D E X.

		Page
A.		
A BANDONMENT	203	
Abatement	203	
Administration	204	
Affidavit	76	
Agent	204	
Annuity	205	
Appearance	3, 7, 9	
Apprentice	205	
Arbitration	208	
Arrest	74	
Affault	60	
Assumpsit	6, 15, 18, 123	
Attachment	210	
Attornies	211	
Avowry	177	
B.		
Bail, below	75	
— above	79	
— Exception to	84	
— Justification of	85	
— Proceedings against	111	
— Common	7	
Bankrupt	215	
— Assignees of	216	
Bill of Middlesex	8	
Brief	35	
C.		
Capias	80	
Case	141	
Case distinguished from		156
trespass		
Conspiracy		143
Corporation		219
Costs		220
— taxing		50
Covenant		152
Customs and Excise		223
D.		
Debt		148
Deceit		141
Declaration	14, 300, 304	
— form in assumpsit		18
— in replevin		176
— in ejectment		192
— in affault		62
Defamation		132
Demurrer		58
— form of		61
Detinue		131
Distingas		42
Disturbance to possession		146
Docketting the rolls		89
E.		
Ejectment		182
— landlord against		
tenant		198
— judgment against		
the casual ejec-		
tor		200
Elements		

	Page		Page
Elements of special plead-		L.	
ing	122	Latitat	78
Evidence	225	Libel	134
— <i>virva voce</i>	230		
— hearsay	232		
— declaring <i>de bene</i>			
— <i>esse</i>	27	M.	
— in chief	27		
Error	80	Martial law	257
— rule to assign	104	Motion. See Rule.	
— to alledge di-			
— minution	104	N.	
— assignment of	107		
Execution	231	Negligence	145
		New Trial	21
F.		Non <i>assumpsit</i>	<i>ibid.</i>
		Non <i>pros</i>	256
Feigned issue	236	Non-suit	254
		— judgment as in	
H.		case of	258
		Nuifance	146
<i>Habeas corpus</i>	236	O.	
<i>Habeas corpora juratorum</i>	42	Offices	259
Hundred	240	Outlawry	266
Husband and wife	246		
		P.	
I.		Particulars of plaintiff's	
		demand	19
Infancy	168	Party wall	268
Infant	248	Paupers	<i>ibid.</i>
Informers	250	Payment of money into	
Inquiry	92	court	269
<i>John Doe and Richard Roe</i>		Peers, and members of	
	9, 26	parliament	270
Issue	30	Philosophizing, first rule of	294
— form of it	32	Plan for a reform	291
— entering it on the roll		Plea,	15
	38, 68	— special	164
Judgment	52	— demand of	64
— by default	87	<i>Posse</i>	48
Justices, constables, &c.	251	Prisoners, &c.	273
		Process	

I N D E X.

xxi

	Page		Page
Process	2	Set off	285
bailable	78	Shipping	288
Promissory note and bill		Stock jobbing	ibid.
of exchange	279	Subpoena	35
fictitious		Suggestion on record	289
indorser of	280		
		T.	
R.		Tender	166
<i>Re. fa. lo.</i>	173	Trespass	156
Replevin	172	per quod	160
Record	40	Trover	131
Rule	282		
to declare	ibid.	V.	
to plead	62		
Ruling the sheriff	284	<i>Venire</i>	41
		W.	
S.		<i>Wales</i>	289
Sailor and Soldier	284	Warrant of attorney	289
Sale	285		
<i>Scire facias</i>	115		

Received of the
Hon. Secy. of the
Treasury
the sum of
\$100.00
for
the purchase of
land
in
the
County of
Jefferson
State of
Missouri
this
1st day of
January
1872

Witness my hand and
the seal of the
Department of the
Interior
at
Washington
this
1st day of
January
1872

John W. Foster
Secretary of the Interior

John W. Foster
Secretary of the Interior

John W. Foster
Secretary of the Interior

John W. Foster
Secretary of the Interior

John W. Foster
Secretary of the Interior

P A R T I.

1. The COMMON ACTION notailable.
 2. The Nature of DEMURRER.
 3. _____ of ARREST.
 4. Judgment by DEFAULT.
 5. Proceedings in ERROR.
 6. _____ against BAIL.
-

CHAPTER I.

Of the COMMON ACTION not bailable.

Preliminary Observations.

THE first proceeding is by a genus of writ, called process: (1) (or it is, what is vulgarly called, serving the defendant with a copy of a writ:) which naturally divides itself into two parts: 1st. the writ itself, commanding the sheriff to take the body of the defendant; but which in reality he never does; and 2d. the notice at bottom, directed to the defendant, whereby he knows on what day and in what court to appear.

There are three species, any one of which the plaintiff has his election in suing out, as they have all the same end in view, namely, to compel the defendant to appear.

The species are, in the King's Bench.

- 1st. The bill of *Middlesex* (if the residence of the defendant be in that county.)
- 2d. The *latitat* (used if the defendants resistance be out of *Middlesex*.)

In the Common Pleas.

- 3d. The *capias*.

(1) A writ is in the nature of a letter from the king to the sheriff, commanding him to do some certain act, as for instance, to take the body of the defendant; but if the sheriff be himself defendant, then the writ is directed to the coroner.

Note.

APPEARANCE.

2

Defendant.

CHAPTER I.

Preliminary Observations.

THE first thing done by the defendant is, the putting in an appearance; (1) and he will gain nothing by neglecting it, as if he do not appear within the time limited by law, which is eight days after the return of process; the plaintiff may according to the 12 G. 1. c. 29. appear for him, which is called appearing according to the statute; and by the 25 G. 3. c. 80. s. 22. without filing a warrant to defend, but which must nevertheless be done by the attorney for the defendant, before he can be permitted to plead for his client under the penalty of *l.* by s. 23.

The mode of entering an appearance according to the statute is thus,

The person who served the copy of the writ, must make affidavit thereof, and that it was a true copy, (it is therefore necessary that such person should examine it,) and that it had an *English* notice written under it, directed to the defendant, pursuant to the statute in such case made and provided.

This affidavit should also contain the return of the writ, &c. in short every essential to the writ and notice. (2)

It is sworn before a judge of the Court, or the clerk of the common bails in the King's Bench, if

(1) In *K. B.* it is called filing common bail.

(2) For the form of an affidavit, see *Arrest*.

Plaintiff.

Note. But if the defendant reside in a liberty, then a *non omittas* may be sued out against him, "directing the sheriff not to omit by reason of any liberty to take the defendant," which may be a Bill of *Middlesex*, *latitat* or *capias*.

The return of the writ is the day therein named for the sheriff to have the body of the defendant before the king's justices, and in Common Pleas it must be upon some one of the return days found in the almanack; but always on the first which is called the *Essoin* day.

But in the King's Bench, the bill of *Middlesex* or *latitat* may be sued out one day, and made returnable the next. (2)

Note. This is the first difference between the practice of the two courts.

The *teste* is *not* the day on which the writ is sued out, but the day on which it is dated; in short every writ has two dates, one within, and the other without; the former is called the *teste*, which in *C. P.* must be some day in term, but in *K. B.* it may be any day either in term or vacation.

Note. This is the second difference between the two courts.

And in *C. P.* the *teste* must be fifteen days before the return, which in *K. B.* it need not be. (3)

Note. This is the third variance between the two courts.

But although in *C. P.* there must be fifteen days between the *teste* and return, yet the *teste* may be

(2) *Strange*, 917.

(3) Except by originals, which see under its proper head in the alphabetical chapter.

ante-

Defendants.

in town; but if in the country, before a commissioner.

In the *Common Pleas* before the filazer in town, or commissioner in the country, and an appearance being entered in this manner by the plaintiff, is to all intents and purposes as effectual, as if entered by defendant himself; for the plaintiff may thereupon proceed by filing his *declaration* in the proper office, at the same time giving the defendant notice thereof in writing, mentioning the time when he ought to plead, and which need not be personally served, but only left at his last place of abode. I need hardly mention after the remark of several defendants being put into one writ, that if more than one defendant be named in a *declaration*, as many *copies* must be filed, that each defendant may have an opportunity of taking his own copy out of the office; therefore each should be served with a notice of filing *declaration* separately, containing the cause of action.

Note. But the plaintiff cannot appear for the defendant until the time for defendant's appearance be expired.

The declaration being filed as above, and notice thereof delivered to defendant, the plaintiff may upon giving a rule to plead, and without any further demand of plea proceed to judgment by default.

Note. But the declaration is only deemed well delivered from the time of the notice served.

Having therefore demonstrated that no advantage can in general be gained by the defendant's not appearing, we shall now proceed to shew the means whereby he ought to appear; premising however that as to the effect of appearance, it cures all defect in process. (3)

(3) But this is only when entered by defendant.

Particular

Plaintiff.

antedated, so it be but on a day in term, even though such antedate be anterior to the cause of action.

The date is the day on which the writ is actually sued out, which must be posterior to the cause of action. The writ and copy must both be indorsed with the attorney's name and place of abode, with the date when sued out.

These observations premised, we shall now give an example of the manner in which one of the above writs is sued out, for which purpose we have selected the bill of *Middlesex*, which we shall suppose to be the actual commencement of an action, in the court of King's Bench: "brought by a watchmaker, for the recovery of 30*l.* 5*s.* for a gold repeater, and engraving the letter F, on the outside case;" and this action by *particular example*, we shall continue through every stage until we come to its conclusion, the writ of execution. By this means the reader will become perfectly acquainted with the nature of a common action not bailable, brought for the recovery of the amount of any other manufacturing tradesman's bill; there being no difference in the proceedings whatever, except in the first count in the declaration, which is only in the statement of the plaintiff's trade.

And as to the action of assumpsit for goods sold and delivered, *i. e.* to recover the amount of a merchant, trader's or shopkeeper's bill, the only difference is; that the counts for work and labour are omitted.

And no matter what the sum, so it be above forty shillings; and for forty shillings only, the costs are as high as for 100*l.* except as to the fees of counsel, which are usually given in proportion to the sum there is a probability of recovering. But in cases where the fees of counsel do not depend on the sum to be recovered, they are regulated by the length of the brief; but this is not much thought of except where

APPEARANCE.

7

Defendant.

Particular Example.

The defendant must give his attorney a warrant to defend in like manner, as the plaintiff gave one to his attorney to prosecute, it is on a 2s. 6d. stamp the same as the other, and is filed with the clerk of the common bails at the time of putting in the appearance.

Appearance must be entered in either court within eight days after the return of process, the difference between the return days in one court and the other, having been already taken notice of.

Form of the common Bail Piece, bought at the Stationers, and in which the Blanks are afterwards filled up.

Michaelmas Term in the 3d year of the reign of
King George III.

Middlesex, to wit,

Sturminster and Wey.

The defendant having been served
with process is delivered to bail to,

John Doe of London, Yeoman,
and

Richard Roe of the same
place, Yeoman.

At the suit of the defendant.

Plaintiff's Attorney
November 14th,
1794.

These

Plaintiff.

where the proceedings are special; for in actions for work and labour or goods sold and delivered, the proceedings are so common that the pleadings are much sooner understood, and consequently much quicker read than in an intricate case, so that their fees may be said to be principally guided by the sum to be recovered.

Particular Example.

First the attorney for the plaintiff takes a warrant to prosecute on a 2s. 6d. stamp; thus,

In the Court of King's Bench.

[*Middlesex ss.*] is retained to prosecute by the plaintiff, (4) as his attorney against the defendant.

No. on the file. Plaintiff's attorney.

And having bought a writ at the stationer's printed on parchment, and a copy printed on paper, in both he fills up the blank exactly alike, indorsing his name and place of abode with the day of the month.

Form of the bill of Middlesex.

[*Middlesex to wit.*] The sheriff is commanded to take (name the defendant) and *Richard Roe*, (5) if

(4) Throughout this example, we shall use the terms plaintiff and defendant, instead of names; and in mentioning the attornies, we shall write plaintiff's attorney and defendant's attorney, as those terms will be easier for the reader at first to remember.

(5) This is the way the writs are printed from the absurdity of old custom, *Richard Roe* being only a nominal person.

they

APPEARANCE.

9

Defendant.

These two yeomen, *John Doe* and *Richard Roe*, (4) are persons not existing, and in the *Common Pleas* are never mentioned in a common appearance, which is made out thus.

Middlesex.

Appearance for defendant, late of *Westminster*, gentleman *vs.* plaintiff to a *capias*, returnable on the morrow of *All Souls*.

Note. This therefore we may call the fifth variance in the practice of the two courts.

Note. Disputes respecting the irregularity of the service of process are extremely numerous.

(4) For their birth and parentage, *see post*.

Plaintiff.

they may be found in his bailiwick, and safely keep them so that he may have their bodies before the Lord the King at *Westminster*, on (name the day of the week) (6) next after the morrow of *All souls*, (7) to answer the defendant in a plea of trespass, and that he then have there this precept. Witness, &c.

By bill,

Stormont and Way. (8)

Notice.

Mr. Defendant,

You are served with this process to the intent that you may by your attorney appear in his Majesty's Court of King's Bench, at *Westminster*, at the return thereof being the seventh day of *November* next, in order to your defence in this action.

November 2, 1791. (9) Plaintiff's Attorney,
Inner Temple. (10)

Plaintiff's attorney having filled up the writ and copy, he then takes the original to the bill of *Middlesex* (11) office, and gets it signed by the officer; but it is not sealed, as the *latitat* and *capias* are.

(6) Returns by bill differ from those by original, inasmuch as the latter are on those days marked in the almanack; but the former on *the day of the week* on which you make your writ returnable.

(7) The return.

(8) The chief clerks of the court.

(9) The date.

(10) Indorsed with the date.

(11) For the situation of the different offices, see title "Offices," in the Alphabetical Chapter.

Note.

Plaintiff.

Nota. Here is not only a difference between the two courts, but a difference of proceeding in one court: for why should a writ be sealed, if a bill of *Middlesex* can do without a seal; but as one kind of process is admitted in the *King's Bench* without a seal, and no kind admitted without one, in the *G. P.* we shall call this the fourth variance between the two courts.

At the same time that plaintiff's attorney gets the writ signed, he files in the office his warrant to prosecute, together with a short abstract of the writ called a *præcipe*.

The paper copy must then be personally served on the defendant before the return day, in the evening.

And four defendants may be put in one writ, but so, they must be served with copies respectively.

Thus much for the service of process, but it frequently arises that the defendant cannot be personally served in time, sometimes from his keeping a little out of the way for the purpose, and sometimes the matter may be a little neglected by the person to whose care the service is committed, frequently it arises that the attorney's clerk, the common agent upon these occasions, happens to have a splendid shilling in his pocket; and by the way meets an old acquaintance, to whom if of the quill, the writ and copy are mostly shewn.

Oh! says my friend, never mind, if you be too late for service, report the defendant, "*non est inventus*." What the devil were returns made for, but that two writs should be sued out where one would do; and where two won't do, give me your hand, my boy; three will. "Your health, friend; take out an *alias*."

For if the defendant cannot be served with the copy of the first writ, then a second may be sued out called an *alias*, which differs only from the first in that after the words, "the sheriff is commanded,"

Plaintiff.

is added, "as before he has been commanded." And if the defendant cannot be served upon the *alias*, then a *pluries* issues; which differs from the *alias*, in that instead of *before*, it states, "as he has been often commanded."

And if then he cannot be taken, the plaintiff's attorney issues *pluries* writs till he can be taken. (12)

(12) A gentleman not above twelve months since, shewed me an attorney's bill for writs only, to the amount of 4*l.* 16*s.* and the defendant was not served at last. Now admitting that writs ought yet to continue to be the first proceeding in actions not bailable, what is the sufficient reason, why the first writ ought not to stand good until the defendant *can* be served, without the expence of so many renewals, which generally falls upon the plaintiff; for those who are difficult to be found are generally in bad circumstances.

See Defendant, Chapter I.

CHAPTER II.
DECLARATION.

Plaintiff.

CHAPTER II.

Preliminary Observations.

THIS is the second proceeding in a common action; and may be defined "a letter from the plaintiff to the defendant and the court, informing them of the plaintiff's cause of action."

Its natural primary divisions are three, *i. e.* the Preamble, Counts and Conclusion, and *every Count partakes of the nature of a separate declaration.*

In the *King's Bench*, the preamble begins with "complaining of the defendant's being in the custody of the Marshal;" but in the *C. P.* it begins with stating, "the defendant to have been attached to answer the plaintiff, and whereupon he complains, &c." except the declaration be in debt, then instead of attached, the word "summoned" is used.

And in *K. B.* the preamble of the declaration in debt has these words in addition to the common preamble, "of a plea, that he render to the said defendant 20*l.* (or whatever the sum be) of lawful money of *Great Britain*, which he owes to and unjustly detains from him." And the same is inserted in the *C. P.* "after to answer the defendant," and then whereupon the said plaintiff, &c.

In other respects the declaration is the same in one court, as in the other, except with regard to the pledges to prosecute, which see *infra*.

The declaration which follows in our example, has eight counts in it.

Defendant.

CHAPTER II.

Preliminary Observations.

THE declaration having been defined, "a letter from the plaintiff to the defendant and the court, informing them of the plaintiff's cause of action:" We may therefore define the plea to be "the defendant's answer in writing thereto."

Pleas then are of various kinds.

1st. If the declaration be wrong drawn, either as to form or substance (the latter it very rarely wants, did bulk mean substance, for it is generally long enough, and thick enough;) the defendant may object that, "it is insufficient in law;" this is called a *demurrer*. (5)

2dly. Or if the debt do not amount to 40s. the defendant may plead to the *jurisdiction* of the court, which plea must conclude with praying judgment, "whether the court will have further cognizance of the suit."

3dly. Or to the *disability of the plaintiff*, as that he was an outlaw, and therefore could not sue; in which case the plea must conclude, "by praying judgment if the said plaintiff ought to be answered."

4thly. Or in abatement, as suppose the defendant to be sued by a wrong name. In such case, the

(5) See Chapter on Demurrer.

plea

Plaintiff.

- 1st. Is for 100*l.* for work and labour as a watch-maker.
- 2d. Is for so much as other work and labour were really worth, called "*a quantum meruit.*"
- 3d. Is for 100*l.* for goods sold and delivered.
- 4th. Is for so much as *other* goods sold and delivered were really worth, being another "*quantum meruit.*"
- 5th. Is for another 100*l.* for money laid out for the defendant's use.
- 6th. Is for another 100*l.* lent him.
- 7th. Is to recover another 100*l.* which the defendant has received for the plaintiff's use.
- 8th. Supposes an account to have been stated between them, whereby the defendant was found indebted to the plaintiff in another 100*l.*

Then follows the conclusion, which declares that the defendant not regarding his promises, hath paid none of the sums abovementioned, which if we cast up, amount to 800*l.* yet the conclusion states the damage to be no more than the sum contained in one of the counts, *i. e.* 100*l.* Unnecessary as all these, except the first, may appear to the reader, yet I have heard counsel applaud the advantages of this mode of declaring with,

" You may not alone charge your debtor this way, but you may as well charge him that way, forgetting at the same time the number of risks there are of being non-suited, and then all these charges fall upon yourself." Now as it is free for one man to give his opinion one way, it is equally free for another to give his opinion the other way. I must therefore contend, that one unequivocal count, wherein the cause of action is clearly stated, is far preferable to eight, in each of which the cause of action is *equivocal* and dubious. Indeed you might as well permit a plaintiff to state, that the defendant

Defendant.

plea must conclude "by praying judgment of the bill," but not of the declaration. (6)

Note. The three last kind of pleas are called dilatory ones. By the 4th and 5th of *Anne*, c. 16. no dilatory plea can be admitted, unless an affidavit be at the same time made of the truth thereof, or some probable cause shewn to the court to induce them to believe it true. (7)

5thly. But pleas to the action are of a very different nature, as they are intended to answer the merits of the plaintiff's complaint.

They are of two genera, *i. e.* confession and denial; the former is what is called a *cognovit*, (8) a species of this sort is the payment of money into court, which needs not be of the whole sum, in which case the defendant may then plead the general issue as to the remainder, and so much money as he pays into court, is considered as struck out of the declaration; and the residue is then looked upon as the whole declaration.

Note. So that a defendant may confess the whole, or he may deny the whole; or he may confess part, and deny part of what the plaintiff charges him with in the declaration.

Pleas then that totally deny the cause of complaint are of two kinds, namely, the general issue, or a special plea in bar. *See the latter under its proper head, in the Elements of Special Pleading*; but as to the former, we shall select it for our example.

Particular Example.

On the receipt of this declaration, we shall suppose the attorney to have read it to his client the

(6) *Black. Com.* Vol. III. p. 303.

(7) *Black. Com.* Vol. III. p. 332.

(8) *See post.*

Plaintiff.

defendant was indebted to him in a certain sum generally, without saying for what, as to permit him to state his cause of action, seven or eight, or more different ways, without any one knowing on which count he meant to give evidence. For clear it is, that if the plaintiff do not know himself what his cause of action is, how is it possible the court, the defendant, or any one else should? (13) Indeed, if he cannot ascertain what his demand is, before he begins, he does not deserve to recover; for no man ought to commence an action, that is not fully convinced of the justice of that cause, which it is his duty to explain.

But that the reader may still better understand the nature of a declaration, let us proceed with our example for the recovery of the 30*l*. 5*s* due to our watch-maker.

PARTICULAR EXAMPLE.

I. *Form of the Declaration.*

Stamp, treble-penny. In the King's Bench.

[*Middlesex*, to wit.] The plaintiff complains of the defendant being in the custody of the Marshal (14) of the *Marshalsea*, of our Lord the now King, before the King himself of a plea of trespass on the case. For that whereas.

[1*st*. Count being for work and labour.] The said defendant on the 1*st* day (15) of *November*, in

(13) See particulars of plaintiff's demand, p. 19.

(14) This is the fiction only on which this court proceeds, for the defendant is never taken into the custody of the Marshal, unless removed by *Habeas Corpus*, or surrendered by his bail.

(15) Any day after the cause of action accrued.

the

Defendant.

defendant, who it is true might know that he had had a gold watch of the plaintiff, (9) but then the plaintiff not having delivered his bill, how could the defendant, from the declaration, be enabled to judge the amount of the plaintiff's demand, or how many watches he might mean to charge him with besides; it therefore became necessary before he could be advised as to what to plead, to get the particulars of the plaintiff's demand, or in other words, before he gave an answer that he should properly understand the question; for this long declaration wanted an explanation, for which purpose we shall suppose the defendant's attorney to have taken out a judge's summons, (10) (this being the usual mode of proceeding in such cases) a copy of which he served upon his adversary.

What those particulars were, the reader is already acquainted with; the dispute however between the parties we shall suppose, or rather the defendant's defence was that the watch did not go well; and therefore he wanted the plaintiff to take it back again, who refusing so to do, the defendant was determined to try the point, and the declaration being sent to a special pleader, he advised that the defendant should plead the general issue; for it is never adviseable to plead specially, that which may be given in evidence under a general plea.

Note. The general issue is that which at once thwarts and denies the whole declaration and thereby puts the plaintiff upon the proof of his allegations: the grand advantage of which is,

(9) Though that did not appear upon the face of the declaration, which in my opinion, according to the principles of *English* law, it ought; yet the case is otherwise in practice.

(10) A summons in this case is a stay of proceedings, though in most other cases, it is not until an order thereon be issued.

Plaintiff.

the year of our Lord, 1791, to wit, at *Westminster*, in the county aforesaid, was indebted to the said plaintiff in 100*l.* of lawful money, of *Great Britain*, for the work and labour, care and diligence of the said plaintiff, as a watch-maker, by him the said plaintiff before that time done, performed, and bestowed in and about the business of the said defendant; and for the said defendant, and at his special instance and request, and also for divers materials, and other necessary things, found, provided, used and applied by the said plaintiff on that occasion, at the like special instance and request of the said defendant. "And being so indebted, he the
 " said defendant in consideration thereof, undertook
 " and faithfully promised the said plaintiff to pay
 " him, the said sum of money, when he the said de-
 " fendant should be thereunto afterwards requested."

[2d. Count being the *quantum meruit*.] AND WHEREAS afterwards, to wit, on the day and year aforesaid, at *Westminster* aforesaid, in consideration that the said plaintiff, at the like special instance and request of the said defendant, had before that time done, performed and bestowed, other his work and labour, care and diligence in and about, other the business of the said defendant, for the said defendant and at his like special instance and request; and had also at the like request of the said defendant, found, provided, used and applied divers other materials, and other necessary things, in and about the said business. "He the said defendant then and there,
 " undertook and faithfully promised the said plaintiff
 " to pay him so much money as he therefore rea-
 " sonably deserved to have for the same, whenever
 " the said defendant should be thereunto afterwards
 " requested."

And the said plaintiff avers, that he therefore reasonably deserved to have of the said defendant for
 the

Defendant.

that in the mean time the defendant lays upon his oars, waiting for the plaintiff to come up to him, as till the plaintiff have proved his debt, in contemplation of law the defendant does not owe any thing: agreeable to that excellent maxim, "That every one is innocent, till he be found guilty:" for in a free country, "accusation is not guilt."

I. Form of "Non Assumpsit," (11) being General Issue in this case.

Written on a treble-penny stamp; indeed let it be observed once for all, that this is the stamp common to all the pleadings.

And the said defendant by his attorney, comes and defends the wrong and injury, when, &c. and saith, that he did not undertake and promise, in manner and form, as the said plaintiff hath above thereof complained against him; and of this he puts himself upon the country.

2. Of the time the Defendant has to deliver his Plea.

In K. B.

Four days if declaration be delivered in chief, but eight if delivered conditionally, and the days are reckoned, one inclusive, and the other exclusive.

In C. P.

The same as in K. B. except that the days are reckoned both inclusive.

(11) See General Issues in the elements of Special Pleading.

Note.

Plaintiff

the same, other 100*l.* of like lawful money, to wit, at *Westminster* aforeaid, whereof the said defendant afterwards, to wit, on the same day and year aforeaid, there had notice.

[3d. Count being for goods sold and delivered.] AND WHEREAS the said defendant afterwards, to wit, on the same day and year aforeaid, at *Westminster* aforeaid, was indebted to the said plaintiff in other 100*l.* of like lawful money, for divers goods, wares and merchandizes, by the said plaintiff before that time sold and delivered to the said defendant, and at his special instance and request. "And being so indebted, he the said defendant in consideration thereof afterwards, to wit, on the same day and year aforeaid, at *Westminster* aforeaid, undertook and faithfully promised the said plaintiff, to pay him, the said last mentioned sum of money, when he the said defendant should be thereto afterwards requested."

[4th. Count being a 2d. *quantum meruit.*] AND WHEREAS afterwards, to wit, on the same day and year aforeaid, at *Westminster* aforeaid, in consideration that the said plaintiff, at the like special instance and request of the said defendant, had before that time sold and delivered to the said defendant, divers other goods, wares and merchandizes. "He the said defendant then and there undertook and faithfully promised the said plaintiff, to pay him so much money as he therefore reasonably deserved to have for the same; when he the said defendant should be thereto afterwards requested."

"And the said plaintiff avers, that he therefore reasonably deserved to have of the said defendant, for the same other 100*l.* of like lawful money, to wit, at *Westminster* aforeaid, whereof the said defendant afterwards, to wit, on the same day and year aforeaid there had notice."

[5th.]

Defendant.

Note. This is the eighth variance between the practice of the two courts.

We shall therefore suppose the above plea of *non assumpsit*, to have been delivered in due time.

Plaintiff.

[5th. Count, or that for money laid out and expended.] AND WHEREAS the said defendant afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, was indebted to the said plaintiff in other 100*l.* of like lawful money, for money by the said plaintiff before that time laid out, expended and paid for the said defendant, and at his special instance and request. “And being so indebted, he the said defendant in consideration thereof afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and faithfully promised the said plaintiff to pay him the last mentioned sum of money, when he the said defendant should be thereto afterwards requested.”

[6th. Count, or that for money lent.] AND WHEREAS the said defendant afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, was indebted to the said plaintiff in other 100*l.* of like lawful money, for money by the said plaintiff before that time lent and advanced to the said defendant, and at his like special instance and request. “And being so indebted, he the said defendant in consideration thereof afterwards, to wit, at *Westminster* aforesaid, on the same day and year aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said last mentioned sum, when he the said defendant should be thereto afterwards requested.”

[7th. Count, or that for money had and received.] AND WHEREAS the said defendant, on the same day and year aforesaid, at *Westminster* aforesaid, was indebted to the said plaintiff in other 100*l.* of like lawful money, for money by the said defendant before that time had and received, to the use of the said plaintiff. “And being so indebted, he the said defendant, in consideration thereof afterwards, to wit,

Plaintiff.

“ wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and then and there
“ faithfully promised the said plaintiff to pay him,
“ the said last mentioned sum of money, when he
“ the said defendant should be thereto afterwards
“ requested.”

[8th. Count, or that upon an account stated.]
AND WHEREAS the said defendant afterwards, to wit,
on the same day and year aforesaid, at *Westminster*
aforesaid, accounted with the said plaintiff of and con-
cerning divers other sums of money, before that
time due and owing from the said defendant to the
said plaintiff, and then being in arrear and unpaid:
and upon that account, he the said defendant was
then and there found in arrear, to the said plaintiff
in another large sum of money, to wit, the sum of
other 100*l.* of like lawful money. “ And being so
“ found in arrear, he the said defendant in considera-
“ tion thereof afterwards, to wit, on the same day
“ and year aforesaid, at *Westminster* aforesaid, under-
“ took and faithfully promised the said plaintiff to
“ pay him the said last mentioned sum of money,
“ when he the said defendant should be thereto after-
“ wards requested.”

[Conclusion.] Yet the said defendant not re-
garding his said several promises and undertakings,
so by him made in his behalf as aforesaid, but con-
triving and fraudulently intending, craftily and sub-
tilly, to deceive and defraud the said plaintiff in this
behalf; hath not as yet paid the said several sums of
money, nor any part thereof to the said plaintiff,
although so to do, he the said defendant was re-
quested by the said plaintiff afterwards, to wit, on
the same day and year aforesaid, and often after-
wards, to wit, at *Westminster* aforesaid, but he to
do this, hath hitherto wholly refused and still refuses
so

Plaintiff.

so to do, to the said plaintiff his damages of 100*l*. and therefore he brings suit, &c.

Pledges to prosecute { *John Doe,*
and
Richard Roe. (16)

Note. This is the sixth variance in the practice of the two courts: for in *C. P.* pledgers are not put.

2. *Of the Delivery of the Declaration.*

The plaintiff is at liberty if he choose so to do, to deliver his declaration on the return of the writ, and of course his attorney is then at liberty to charge for it, it is therefore mostly ready by that time, in case

(16) *John Doe* and *Richard Roe*, as it has been already observed are persons not in *esse*, but according to judge *Blackstone*, (1) "the ancient use of them was to answer for the plaintiff, who in case he brought an action without cause, or failed in the prosecution of it, was liable to an amercement from the Crown for raising a false accusation." This custom had its rise from the laws of *Sancho*, not Governor *Sancho*, *Don Quixote's* Squire, but *Sancho I. King of Portugal*; though quere, whether the Governor would not have made a better law-giver than the King? For the King's pledges are now reduced to mere names; and surely as we can do without their personal services, I think we might dispense with their nominal ones; for what purpose do their nominal services answer at present, except that in case the attorney for the plaintiff happen to forget them, the declaration may be demurred to specially, and the plaintiff is rendered liable to costs, and for what? for neglecting to put in the names of persons that don't exist! However those gentlemen of whom nothing now remain but their names, and the costs which sometimes follow the omission of them are, in common actions, in the *Common Pleas*, totally left out, except in proceedings by bill against peers, &c. (2) but in the *K. B.* they are yet retained.

(1) *V. III.* p. 275.

(2) See title *Peers*, &c. in the alphabetical chapter.

Plaintiff.

the defendant apply to pay the debt, or at least a special pleader has instructions to draw it; and in general whether drawn or not, it is pretty much the same to both plaintiff and defendant, as it rarely happens that either of them understand it; and not frequently that their attornies can explain it. Indeed in most cases, 'where the scholars know little, the masters don't know much more.' To prove this, if the attornies always understood their declarations, why do they employ special pleaders to draw them? and as the attornies are obliged to employ special pleaders to draw them, it is no wonder that the clients should want other commentators besides the attornies to explain them; thus as the declaration is drawn by one special pleader, so is the plea by another; so that neither the plaintiff declares upon his own knowledge or understanding, nor does the defendant plead upon his, but they both take other people's words, two deep; i. e. the client applies to his attorney, and the attorney applies to his special pleader!!!

3. *Of declaring De bene esse.*

The plaintiff may deliver his declaration before the defendant has appeared, and this is called, "*De bene esse*," or delivering it conditionally.

4. *Of declaring in Chief.*

Or he may deliver his declaration in chief, that is after the defendant has appeared.

Note. The difference as to these two ways of declaring is that in the former way, the defendant has eight, and in the latter only four days notice to plead; we shall therefore select the latter, by supposing our declaration according to the example above,

Plaintiff.

above, to have been delivered to the defendant with the following indorsement.

Copy declaration, fo. 18 (17) at 4*d.* each - 0 6 0
Duty 3*d.* stamp on each sheet of paper (18) 0 0 9

The plaintiff demands a plea in this cause, within four days from the date hereof, otherwise judgment, dated this 15th day of *November*, 1791. Your's,

Attorney for the plaintiff.

To Mr. Defendant's Attorney,

5. *Of the Time before Plaintiff need declare.*

But if the plaintiff do not choose to go on with his action so fast, then the time allowed (19) him is :

In K. B.

Till the end of the term after that, in which process was returnable.

In C. P.

The like time as in *K. B.* if called on by rule; if not, plaintiff has till the Effoin day of the third term.

Note. This is the seventh difference between the practice of the two courts.

See Defendant, Chapter II. for Plea.

(17) A folio is 72 words.

(18) For a sheet of paper close copied, commonly contains about 6 or 7 folios.

(19) And this time is often not enough, for it frequently arises that the special pleader is tardy in drawing it, in which case he directs the attorney to take out a summons for time; by which means not unfrequently, as the reader must well know, the defendant in the mean time, runs away.

CHAPTER III.
I S S U E.

CHAPTER III.

Preliminary Observations.

THIS is the third stage of a common action, and that wherein all the pleadings are finished.

Issue signifies no more than an agreement between the parties to rest their cause upon some particular point, and this may be either a point of law, or a point of fact, or it is the appeal of both plaintiff and defendant; to the court in the one case, or to a jury in the other case.

Whenever the issue happens to be an issue at law, one party avers the declaration, plea, &c. of his adversary to be insufficient in law, and the other joins issue by averring it to be sufficient; which is called a joinder in Demurrer.

But when the issue is in fact, the parties appeal to the country, *i. e.* to a jury, "if the plaintiff, he prays," it may be enquired of by the country. But if the defendant, he concludes, "with putting himself on the country," of which latter nature is our example; and it is then subjoined by the adverse party "that he doth the like."

But what we have here been speaking of, is the effectual part of an issue: for alas! there is much more to do before issue is joined in this simple manner; as now the declaration and plea are both copied over again by the plaintiff's attorney, on a treble-penny stamped paper as before; but first however comes the memorandum part, then the declaration, and then the plea, at the bottom of which issue is joined as abovementioned.

But

Defendant.

CHAPTER III.

THE defendant's attorney, on the receipt of the issue, has nothing to do but to pay the charge on the back, or as has been observed, judgment may be signed in twenty-four hours after the issue has been delivered.

Plaintiff.

But this will be better understood by continuing our

Particular Example.

Michaelmas Term, in the 32d. Year of the Reign of King *George* III.

[*Middlesex*, to wit.] Be it remembered, that on (20) (name the day of the week) next, after the morrow of *All Souls*, in this same term, before our lord the king, at *Westminster*, comes the plaintiff by his attorney; and brings into the court of our said lord the king, before the king himself now here, his certain bill against the defendant, being in the custody of the marshal of the *Marshalsea*, of the lord the now king; before the king himself, of a plea of trespass on the case, (21) and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit,

[*Middlesex* ff.] Here the whole declaration is inserted at full length.

Then on a new line the plea is entered, and at the end thereof is added,

And the said plaintiff doth the like, therefore let a jury come before our lord the king at *Westminster*, on (the (22) day of the week) next after fifteen days of *Saint Martin*, twelve, &c. by whom, &c. and

(20) The first day of term.

(21) If the action be other than *on the case* it is so stated; but every action in case, is trespass on the case; in opposition to trespass "*vi et armis*" which latter is commonly called trespass, only; but see the Elements of Special Pleading.

(22) The last day of the term, when the cause is to be tried the sittings after: but if to be tried at a sitting in term, then the first day; and when to be tried in the country, then always put the last day of the term in which issue was joined.

who

Plaintiff.

who neither, &c. because as well, &c. the same day is given to the parties at the same place.

Indorsement.

Then on the back, the price of copying at 4d. a folio is indorsed with the amount of the treble-penny stamps, and the amount of the copy of the declaration, if not paid for; and if the whole be not now cleared off by the defendant's attorney, judgment may be signed in twenty-four hours. (23)

(23) *Sellon's Analysis*, p. 25.

See Defendant, Chapter III.

CHAPTER IV.

Preliminary Observations.

TO give this is the next step taken by plaintiff's attorney, it is written on a slip of plain paper without a stamp; indeed it is frequently written on the back of the issue; but the plaintiff is not bound to give notice of trial, till the term succeeding that in which issue was joined; this rule however, is peculiar to the *King's Bench*, as in the *C. P.* it must be given the same term, provided issue be joined time enough for the cause to be tried that term, or the sittings after. (24)

Note. This is the ninth difference between the practice of the two courts.

I. Of the Term of the Notice.

In both courts, if the venue be laid in *London* or *Middlesex*, and the defendant's residence be within forty miles of *London*, notice of trial must be given eight days, exclusive of the day on which it is delivered. But,

If the defendant's residence exceed forty miles, then fourteen days notice must be given. And,

In country causes, ten days notice are required in both courts.

But, if no proceedings have been had for four terms, then

A whole term's notice must be given, unless the defendant himself have delayed the cause by injunction.

(24) *Frampton v. Payne*, *Blackf. Rep. C. P.* 65.

2. Of

Defendant.

CHAPTER IV.

Preliminary Observations.

ON receiving notice of trial, the defendant's attorney then draws his brief, but only one copy is necessary in common cases, the usual rule being that the plaintiff has two counsel, and the defendant one.

The Brief contains,

1st. An abridgment, or rather a decoration of the pleadings, for they are very little shorter in the briefs than when delivered.

2d. The *case*; which should be stated just as it happened, and the names of the witnesses who are to prove it, with what they are to prove respectively. The plaintiff's briefs are drawn in the like manner.

Subpoena.

This is a writ, the design of which is to compel the appearance of witnesses, the names of four of whom may be put into one writ. There is no need for a *particular example* as to the manner of filling up the blanks, for he who can fill up a process, cannot fail knowing how to fill up a subpoena, as the writ being printed shews itself; suffice therefore to say, that as many witnesses as you name in the original, so many copies must be made on paper, and each witness served with one, and a shilling given him for conduct money; but if his residence be at any distance from the town, wherein the cause is to be tried,

*Plaintiff.*2. *Of countermanding, &c.*

After notice of trial has been given, the plaintiff may countermand it, and give a fresh notice at a future time; or he may continue his notice to another sitting if the cause be to be tried in *London* or *Middlesex*; but this latter he can only do once.

The time of countermanding or continuing is, if the residence of the defendant be within forty miles of *London*, two days exclusive of the day on which notice of countermand is delivered; but as to continuance, in the *C. P.* one day's notice is sufficient, that may be the day before the trial. (25)

Note. This is the tenth difference between the practice of the courts.

If defendant's residence be above forty miles from *London*, or the cause be to be tried in the country, then notice of countermand or continuance must be at least six days before trial.

Note. In case plaintiff do not proceed to trial according to notice not countermanded, the record may be withdrawn, and in such case the plaintiff must pay the defendant his costs of the day, *i. e.* all those costs incurred since notice of trial given.

*Particular Example.**Plaintiff.*

against

*Defendant.*In the *K. B.*

Take notice of trial in this cause for the sittings after this present *Michaelmas* term, to be held at *Westminster Hall*, in the county of *Middlesex*, dated this 20th day of *November*, 1791.

See Defendant, Chapter IV. as to Brief and Subpoena, &c.

(25) *Sellen's Analysis*, p. 26.

Defendant.

then the witness need not come unless his expences be first tendered him; but the usual way is, for the party on whose behalf the witness is to be examined, to provide him with proper carriage both from his home to the court and back again, and as well to defray his expences while absent. (12)

Note. When any deed, writing, &c. is to be produced, a notice should be indorsed on the back of the subpoena to produce the same, and describing it in such a manner, as that the party may know what deed, &c. is required.

(12) See title Evidence in the Alphabetical Chapter.

Plaintiff.

CHAPTER V.

Of entering the ISSUE on the ROLL.

Preliminary Observations.

THE pleadings as we have observed being already twice copied on paper, are now engrossed or written on a parchment roll, being the third time of copying; but to shew the manner in which this is done, let us proceed to our example; for it should be observed that before trial, an *incipitur* or beginning only of the entry is made, and after trial, I believe the attornies very rarely enter any thing further, (26) unless compelled by rule.

Particular Example.

Hitherto of *Michaelmas* Term 32d. *George* III.

Witness *Lloyd*, Lord *Kenyon*,

[*Middlesex* ss.] The plaintiff puts in his place his attorney against the defendant, in a plea of trespass on the case.

[*Middlesex* ss.] The said defendant puts in his place his attorney, at the suit of the said plaintiff in the plea aforesaid. (27)

Then follows the whole issue at full length, the same as delivered.

(26) Yet the whole entry is always charged in the bill and ought in strictness to be made.

(27) These are called the warrants of attorney.

DOCKETTING THE ROLLS.

Plaintiff

CHAPTER VI.

DOCKETTING the ROLLS.

Preliminary Observations

A Docket is a sort of memorial, or rather a short note of the roll entered

In K. B.

With the clerk of the judgments.

In C. P.

With the prothonotary.

Particular Example.

The attorney gets a number roll of the clerk of the judgments, subscribing his name to the docket, and makes out the docket paper, thus,

The entry of the plaintiff's attorney, gentleman one, &c. of *Michaelmas* term, 32d. *George III.* 1791.

[*Middlesex ff.*] Issue joined in case between plaintiff and defendant on a plea of *non assumpsit*. } Roll 390.

Then the clerk of the judgments, if all the entries be paid for, marks the roll by putting his stamp thereon, after which it is filed in the treasury.

RECORD.

Plaintiff.

CHAPTER VII.

Of the RECORD.

Preliminary Observations.

[Stamp double half crown] **T**HIS is a large skin of parchment, on which all the proceedings are engrossed at full length, being the second time they are engrossed on parchment, after having been twice before written on paper, we may consequently call this the *fourth* time of copying.

PARTICULAR EXAMPLE.

i. Form of the Record.

Pleas before our lord the king, at *Westminster*, of the term of *Saint Michael*, in the 32d. year of the reign of our sovereign lord *George III.* by the grace of God, of *Great Britain, France and Ireland*, king, defender of the faith, and in the year of our Lord, 1791, (28) Roll 300.

Stormont and Way.

Then the whole issue is entered verbatim as delivered; and next,

The 2d. placita; then,

The jurata; thus,

[*Middlesex ff.*] The jury between plaintiff by his attorney, and defendant by his attorney, of a plea of

(28) This is called a *placita*, of which every record must have two, one of the term issue is joined, and the other of the term the cause is tried.

trespass

Plaintiff.

trespass on the case, is respited before our lord the king, at *Westminster*, until (the day of the week) next after the morrow of *Saint Martin*, (29) unless the right honourable *Lloyd*, Lord *Kenyon*, his majesty's chief-justice, assigned to hold pleas before the king himself, shall first come on (the day of the week, and day of the month) (30) at *Westminster* hall, in the county of *Middlesex*; according to the form of the statute, in such case made and provided for default of the jurors, because none of them did appear. Therefore (31) let the sheriff have the bodies of the said jurors, to make the said jury between the parties aforesaid, of the plea aforesaid; accordingly the same day is given to the parties aforesaid, at the same place.

2. *Venire Facias.*

This writ commands the sheriff to call a jury; the teste of it is usually the first day of term in which the cause is to be tried, and the return of it some day before the trial.

Note. Observe that in the *C. P.* this as well as all other writs, must be made returnable on the certain return days; but in the *K. B.* they may be returnable any day in term (unless the proceedings be by original) and in this court the venire is sealed only; but in *C. P.* it is signed also by the prothonotary.

Note. This is the eleventh difference between the practice of the two courts.

(29) Usually the first return in the subsequent term, when the cause is tried the sittings after term, and when in term, then the first return after the trial, on which day too the distringas ought to be made returnable.

(30) The day of trial.

(31) The writ here recited is called in the *K. B.* the *distringas*; but in *C. P.* the "*habeas corpora juratorum*."

The

Plaintiff.

The writ of venire being made out, is then got returned at the sheriff's office.

3. Of the Distringas. (32)

By this writ the jury are supposed to be distrained for not coming.

The return to it, is usually the first return day after trial, and the teste the return day of the venire.

Note. The *distringas* in the *K. B.* is only sealed; but in the *C. P.* it is signed as well by the clerk of the *habeas corpora juratorum*. This is the twelfth difference in the practice of the two courts.

The *distringas* is got returned by the sheriff in like manner as the venire, and both together are annexed to the record with the panel.

This then is the regular way of making up the record.

(32) Called in the *C. P.* the *habeas corpora juratorum*.

Plaintiff.

CHAPTER VIII.

Of entering the CAUSE for TRIAL.

THIS is done by leaving the record, with the distringas and panel annexed, at the chief justice's chambers.

When to be entered.

In K. B.

If for any sitting in term, in *London* and *Middlesex*, the cause must be entered two days exclusive before the day of trial.

If for the sittings after term, it must be entered before the adjournment day.

In C. B.

If in *London* or *Middlesex*, the cause may be entered, and the record, &c. brought in, any day before the sittings.

Note. In country causes, the record, &c. is delivered to the marshal the day after the commission is opened, but before the court sits.

2. *Ne Recipiatur.*

This is a kind of caveat sometimes made use of in *K. B.* entered in the marshal's book by the defendant, when plaintiff has neglected to set his cause down in time: which precludes him from setting it down afterwards.

CHAPTER IX.

T R I A L. (33)

Preliminary Observations:

THIS may now be said to be reduced to two kinds only, namely, that by the court upon issue of law, and that by a jury upon issue of fact; and very fairly too are both conducted, indeed so much so, that we may safely say, more pains could not possibly be used, nor better means be devised for the investigation of truth, than those used upon the trial of causes in *English* courts of justice; for the suit is then arrived at a period, when all the proceedings are reduced to plain sense, and the left handed wisdom begins to be dropped.

There is no fault therefore can be found with the method of trial; the only grievance is the *heavy expence* of proceeding so far, arising clearly from the difficulty of falling into that latitude; the obstructions to justice being too many, and the quicksands of fraud, sometimes nicknamed policy, numerous and dangerous; the passage is therefore by no means pleasant, and owing to its difficulty, but badly known by the navigators, for where one cause comes into court to be tried, an hundred are settled before issue joined; both parties being frightened at the enormity of the charge. Thus do the generality of Britons lose their rights, by being deprived of a patient hearing. I ask this question, why do people go to law in the first instance? Surely it is that

(33) We have here dropped the double entry, being of no further use at present.

their cause may be argued publicly by able advocates, capable of putting every circumstance in its best point of view; that thence the truth may boldly appear. Could not this be done then, without that vast length of declaration, those funds of writs, notice, rules, &c, that occur in every simple cause, and tend only to confuse the meaning of the parties! ! !

I had almost said, the only money well laid out is that paid to counsel; for were the proceedings shortened, the services of the attorney would be made much more acceptable to the client, and no doubt much more honourable, as well as much more profitable to himself; for were the expense less, the number of causes would be greater; and law would then come within the compass of every man's purchase, from which no doubt one excellent effect would inevitably spring; namely, that of rendering the country at large more virtuous, by the more frequent discussion of the moral duties. And as many more matters of fact would be discussed, many able young men might then come forward, as a blessing to the public in general, who are now lost in obscurity, useless to themselves and all the world besides.

Then might many illustrious families boast a *Camden*, who have now only the mortification to own, that their kinsmen have studied the law; to pay one two or three hundred pounds each, to be copying clerks (though in the character of gentlemen) in the offices of special pleaders, a species of block-heads, who are no other than the deputies of attorneys, (34) and who draw for a crown, the same

(34) But those at the bar have never less than a guinea for drawing a declaration, and half a guinea for a plea.

declaration

declaration for which their master the attorney charges a guinea.

But there is no necessity to digress further on this subject, the fact is too well known to need any further comment; let us therefore proceed to relate the manner in which the trial of an issue of fact is usually conducted, for which purpose we shall continue our cause concerning the gold repeater, by

Particular Example.

1st. The clerk of *nisi prius* (35) calls on the cause by naming the plaintiff and defendant.

2d. The jury are sworn to try well and truly, the issue joined between the parties.

Then the junior counsel for the plaintiff (36) opens the pleadings, as for example, were this cause about the watch trying.

May it please your Lordships

Gentlemen of the Jury.

The plaintiff is a respectable watch-maker in Bond Street.

The defendant a gentleman resident in Berkeley Square.

(35) The usual idea now annexed to *nisi prius*, is that part in and after every term, in which a judge sits to try causes assised by a jury, commonly called sittings, a much better term than *nisi prius*, "a court of unless before." The definition of which let us leave to those lawyers who write only to warp common sense, by endeavouring to explain absurdities.

(36) Unless the affirmative side of the question be maintained by the defendant. See Replevin.

The

The declaration states the defendant to be indebted to the plaintiff for work, and labour, and materials found as a watch-maker; there are seven other counts as in ordinary cases, and the conclusion states the plaintiff's damage to be 100*l*.

To which the defendant has pleaded the general issue, "*non assumpsit*," and thereupon issue is joined.

Then the senior counsel for the plaintiff opens the case, by stating the facts as they occurred; for whom there is no occasion to make a speech, the reader being already in possession of the merits.

When he has finished he then calls the plaintiff's witnesses; who separately as he examines them, are if occasion requires cross-examined by the counsel for the defendant; and the plaintiff's evidence, being wholly gone through,

The counsel for the defendant then opens the case of his client, which, if he call witnesses to support,

Then the senior counsel for the plaintiff is entitled to reply: but if no witnesses be called for the defendant,

Then the judge directly sums up the evidence, with as much impartiality as possible; and the jury considering well the whole matter, return their verdict by the mouth of their foreman, in open court,

Which in the present instance, from the nature of the defence, "*the watch not going well*," we may safely set down to be for the plaintiff; for every thing goes ill with a defendant, whose intention is never to pay till compelled by law; we shall therefore assess the damages at the full sum demanded, (not by the declaration, but by the plaintiff in his bill,) namely 50*l* 5*s*.

C H A P T E R X.

P O S T E A. (37)

THE Record being delivered to the attorney of the victorious party at the time of trial, (38) he indorses the "*possea*."

Particular Example.

Afterwards, that is to say, on the day, and at the place within-mentioned, before the Right Honourable *Lloyd, Lord Kenyon*, the chief-justice within written, *John Way*, gentleman, being associated to the said chief-justice by force of the statute in such case made and provided, the within-named plaintiff came by his attorney within-named, and the within-named defendant, although solemnly required, came not, but made default; therefore let the jurors of that jury within-mentioned, be taken against him by his default: and the jurors of that jury being summoned, came, who to say the truth of the within contents being chosen, tried and sworn, say upon their oath, that the within-named defendant did undertake and promise, in manner and form as the within-named plaintiff hath within complained against him; and they assess the damages of the said plain-

(37) This is properly speaking the history of what was done on the trial.

(38) This however is only in the *K. B.* as in *C. P.* the associate indorses the *possea*, who if the cause be tried in term, delivers it to the attorney for the victor about the 5th day after trial; if in vacation, then in the first week in the subsequent term, but in country causes, the associate indorses the *possea* in both courts.

Plaintiff.

tiff, by occasion of the not performing the within-mentioned promises and undertakings over and above his costs and charges, by him about his suit, in this behalf expended to 30*l.* 5*s.* and for those costs and charges to forty shillings.

Rule for Judgment. (39)

This is given in the *K. B.* on the return day of the *distringas*, which is usually the day of trial, it is entered at the office of the clerk of the rules, on a slip of paper, thus,

Plaintiff against defendant.

"Rule for judgment on *postea*."

This is a four day rule in full term; but Sunday or any holiday whereon the court does not sit, must not be reckoned, *unless* the rule be entered on the last day of term, *or within* four days after the term.

And in course of these four days, should the losing party not be successful in any motion in arrest of judgment, or for a new trial that he may choose to make; *then final judgment may be signed.*

Note. But in the court of *C. P.* no rule for judgment is given at all, but the victorious party only waits till four days after the return of the "*babeas corpora juratorum*," (40) and then signs his judgment of course, unless a rule of court obtained by motion otherwise direct.

Note. 2. This is the thirteenth variance between the practice of the two courts, and as *distringas* may be made returnable in the *K. B.* on the day of trial, or any day after; which in *C. P.* it cannot, because in the latter court you must wait till the first return after trial, as marked in the calendar; we are therefore now arrived at the fourteenth difference in the practice of the two courts.

(39) But after non-suit, this rule is not necessary.

(40) This in the *C. P.* is always made the first return after the trial.

Plaintiff.

CHAPTER XI.

Of TAXING the COSTS.

Preliminary Observations.

THE costs of which we are here about to treat, are those only between party and party, *i. e.* those costs which the conquered party is obliged to pay to the victorious; which being added to the damages, execution issues for the whole.

Other costs are called those between attorney and client, *i. e.* those which notwithstanding the client obtains a verdict, he must nevertheless pay out of his own pocket.

Of this latter kind are all retainers; and commonly the expence of moving the court, where the design of the motion is to accommodate the party moving; or if on the day of trial, the attorney for the plaintiff happen to be absent, and the record be withdrawn, the plaintiff must pay the defendant his costs accrued since the time that notice of trial was given. And also when the action is neither in debt nor covenant; because then the plaintiff has the sheriff's poundage to pay; it is for this reason, why the forty shillings mentioned in the *postea* are given; and consequently, whenever there are extra costs, these forty shillings ought at all times to be deducted.

Suffice therefore to say, that the plaintiff's costs in a common action not bailable, are commonly from about 25*l.* to 30*l.* (41) in K. B. in C. P. they

(41) I mean those between party and party, *i. e.* exclusive of the extra costs.

are

Defendant.

CHAPTER XI.

WHEN the plaintiff has obtained a verdict, if the defendant's attorney doubt whether the plaintiff's will give him a notice, so that he may be present on the taxation; he may have a rule at the office of the clerk of the rules, and serve a copy thereof on the plaintiff's attorney; and so *vice versa*.

As to the defendant's costs, they seldom exceed half the plaintiff's, unless he have more than one counsel, and the same rules which guide the plaintiff's costs, guide those of the defendant; but *see* costs in the Alphabetical Chapter.

Plaintiff.

are about one-fifth higher. But in this computation, no collateral matters such as motions, or the expence of bringing witnesses out of the country are considered, as they must wholly depend on circumstances.

I need hardly add that in case the plaintiff obtain a verdict, the defendant must re-imburse him his costs: as it has been already mentioned, that they are added to the damages, and execution issues for the whole.

Of final Judgment.

This directly follows the *postea* and is signed by the master, usually at the time of taxing costs, being first marked *deliberatur* by the clerk of the common bails.

Particular Example.

Therefore it is considered that the said plaintiff recover against the said defendant his said damages, by the said jury in form aforesaid assessed; and also 30*l.* (42) for his costs and charges by the court of

{42} In actions similar to our example, the plaintiff's costs generally amount to about this sum or more; for in ordinary, they are not followed up so quick as to be finished the first or the beginning of the second term; but various delays take place, such as getting time to declare or plead, which is done by a judge's summons, upon which an order is made after a hearing; but as the adverse attorney is not obliged to attend till the third summons, he rarely does, so as not to abridge his opponent of his costs, who gives him the turn of the market another time. Or perhaps it is necessary to take out a summons to make the plaintiff deliver the particulars of his demand, in such you have the three attendances of your own attorney to pay for, and one of your assailant's, making four in all, at 3*l.* 4*d.* each, besides the expence of summonses and order. Thus do many of these retail charges make a wholesale bill.

out

Plaintiff.

our said lord the king, now here adjudged to the said plaintiff by his assent, which damages in the whole amount to 60*l.* 5*s.* and that the said defendant be in mercy, &c.

Note. In like manner as all proceedings are from time to time continued on the record, so ought they to be continued upon the issue roll; and this is done where the roll has been before carried in, by taking the record, having the *postea* and judgment thereon indorsed to the treasury at *Westminster*, when the clerk on leaving it will enter the *postea* and judgment on the roll.

Execution. (43)

The design of this writ is to compel the losing party to satisfy the debt and costs.

It is the last step in short taken by the victor, who is now through the medium of the sheriff at liberty to seize the body of his vanquished enemy, besiege his castle, or encamp himself in his country.

For executions are usually of three species, any one of which may be bought at the stationers, and the blanks filled up; of the manner of doing which, it is unnecessary to give any example; for he who is able to fill up a common process, will never be at a loss to know how to fill up any other writ of any nature whatever; suffice therefore to say, that,

The first species of execution is the *fiere facias*, (44) which seizes the goods *only*; but if the sheriff's return

(43) If not sued out within a year and a day, the judgment must be revived by *fiere facias*; and in the *K. B.* executions are sealed only; but in *C. P.* they must be both signed and sealed.

Note. This is the fifteenth variance in the practice of the two courts.

(44) In levying execution, the landlord must be paid as far as a year's rent, if due to him, before any thing can be moved off the

Plaintiff.

turn be, "that the goods remain in his hands for want of buyers," then a second writ issues, called a "*wenditioni exponas*," commanding the sheriff to sell them; but if when sold the amount of them be insufficient, a *capias ad satisfaciendum* may be had for the remainder.

The second species is that of the *capias ad satisfaciendum*, which takes the body.

These two are by far the most common executions sued out, and being taken to the sheriff's office, you receive a warrant directed to any bailiff you choose; and he in consequence of such warrant puts the writ in execution.

The third species is that of *elegit*, which owing to its long process is really curious in its nature.

The design of it, is to take all the goods, and one half of the profits of the lands, *i. e.* of freehold (45) estates, for any other kind may be sold by a *fieri facias*; but the sheriff before he can take either lands or goods by *elegit*, must first empanel a jury to

the premises; and it is the duty of the sheriff to enquire what is due; however it is always prudent for the landlord to give the sheriff notice, for there is a case in 1 *Strange* 97. to that effect. But what a *strange* situation would a landlord find himself in, who did not know his tenants goods were taken; for is a man always to be walking past his tenant's door, or searching the sheriff's office? The reason of the case therefore, seems to me as strong for the sheriff to enquire who the landlord is, and then give him notice of the execution being on the premises, and when the writ is returnable; as for the landlord, in the first instance to give notice to the sheriff, for the latter cannot fail knowing that he has levied, but the former can never know unless somebody happen to tell him, or that by some means he accidentally discovers it.

It is by statute of the 8th of *Anne*, c. 14. §. 1. that the sheriff is bound to pay the landlord; but this only extends to the *immediate*, not to the ground landlord.

(45) Copyholds not being liable, unless for a debt to the king.
enquire

Plaintiff.

enquire what goods the debtor hath in his country; and having appraised them at a reasonable price, he must then deliver them to the creditor in part of the debt, (except beasts of the plough),

But with regard to the lands it is otherwise; those he can only enquire by a jury concerning, and report to the court by his return the particulars of his inquest; but he has no power to deliver them to the creditor, who if he have any inclination to get paid his debt, must then bring an *action* of ejectment to gain the possession of them, and when he has possession he cannot sell them, but only receive half rents.

Now can any one give a sufficient reason, why 1000*l.* in personal estate, should not be held equally sacred to its owner as 1000*l.* real estate; or why a man possessed of real property *only*, should not by the same simple rule of common honesty be compelled to satisfy the judgment of a court of justice, in the same manner, as he who is possessed of personal property *only*?

We do not surely estimate the value of a man's property, solely by the nature of the title by which he holds it; but, by the comparative worth of that estate in money; and surely there is no axiom in morality, that the leaseholder shall be obliged to satisfy his creditors, while the freeholder shall be privileged to run in debt, and by thus harassing his creditor be able to defraud him.

And how in the name of wonder too can that man bring a second action; (46) whom the costs of the first have ruined? Therefore, ought not freehold estates to be equally liable to be taken by a *feri facias* as leasehold; and ought not copyhold to be equally liable as either?

(46) The ejectment to recover possession.

Conclusive Observations.

THUS then, we have now finished our common action not bailable, the process being the first writ; and the execution by *fi. fa. ca. fa.* or *elegit*, the last one of which can only be out at a time, and if any lands be taken, *no execution can then be had against the body*; though if goods and chattels only be taken and they turn out insufficient, still can the body be taken for the remainder, so that a man only having leasehold property may have his estate first sold, and his body thrown into gaol afterwards; but he who has freehold estates is not liable to have them sold even; but only to have half the rents received. And this holds his person sacred, for the lands once taken, that is half the rents of them, the body cannot be touched.

With regard to the former proceedings, it is no wonder why costs of suit are so expensive, since the declaration contains so many counts; in the present instance, for example, the cause of action is stated no less than *eight* different times, that being the number of counts contained in the declaration, and the proceedings in the course of the cause being *twice* copied on paper, and *twice* engrossed on parchment, it is mathematically demonstrated that in an action for a common tradesman's bill, wherein the declaration has eight counts; the *cause of action* in the course of the whole proceedings is *thirty-two* times copied over, besides writs, præcipes, dockets, notices, &c. and if any one dispute this, he must doubt that four times eight make thirty-two.

And to the thirty-two may be fairly added another eight, for there is in the *King's Bench* always a charge in an attorney's bill, where the proceedings are

CONCLUSIVE OBSERVATIONS. 57.

are by *bill*, of "engrossing, parchment duty, filing and continuing," though this is very rarely done, yet if a writ of error be afterwards brought, then the plaintiff's attorney *must file* his bill; however, the *charge is never neglected*, therefore it is equally fair to take it into our reckoning.

This then makes the number of repetitions in the whole amount to *forty!!!*

BOOK II.

CHAPTER I.

Preliminary Observations.

AS in the last chapter we treated of an issue of fact, we shall in this treat of an issue of law; the determination of which is always by the judges without a jury, and it is commonly called, "argument on demurrer or confilium."

Of demurrers then let it be observed, there are two species, *i. e.* general and special; the first is as to substance, and the next as to form; in the latter some reason is always given why the declaration, plea, &c. is insufficient in law, whereas in the former, instead of a particular cause being assigned, a general averment is only made.

General demurrers are delivered to the adverse attorney, but special ones or general ones after a special plea, are filed with the clerk of the papers in *K. B.* but in *C. P.* both general and special are delivered.

Note. This is the sixteenth variance between the practice of the two courts.

All demurrers, whether general or special, must be signed by counsel, and in the *C. P.* no counsel except serjeants can sign; in either court the fee is usually half a guinea, but it may be more according to the length and nature of the plea.

We shall proceed in this as in our issue of fact, by giving a particular example, and we cannot select

Defendant.

CHAPTER I.

MR. *Pouncepowder* having received the declaration, no sooner read it over than he d—d *Quilworthy* for a fool in not knowing the leading feature of an action of trespass, which is always *vi et armis*, "with force and arms, to wit, &c." I knew this, said *Pouncepowder*, the first year of my clerkship; is it not surprising, said he, that people should serve five years to a profession and know nothing about it when they have done?

I shall demur to this declaration, continued *Pouncepowder*; but stop, "must the demurrer be general or special? hang it I'll run no risk as to that," so off went *Pouncepowder* to his special pleader with the declaration stuck in one pocket, and a bundle of papers stuck in the other; "to shew he was a man of business."

Arrived and announced at the special pleader's chambers, he immediately communicated his business, and commended himself upon the accuracy of his own judgment, adding that few people saw things quicker than he did, but confessed nevertheless his ignorance as to whether the demurrer should be general or special.

Oh *special* to be sure, says the *special* pleader, special by all means, by the 4th and 5th of *Anne*, cap. 16. if I don't mistake; besides you'll find it in *Impey* particularly mentioned, that the omission of *vi et armis*, requires a special demurrer; not in his *King's Bench Clericalis*, for if my memory don't fail me, he has left it out in that, but in his *Common Pleas* one, (13) there he has given you an extract

Plaintiff.

select a better action for the purpose than that of assault, and wherein we shall give the names of the parties, their counsel and attornies, as being of a kind easy to retain in the memory.

The parties themselves then, were two maiden ladies; Mrs. *Deborah Tongue* and Mrs. *Susan Soufe*; their attornies, Mr. *Quilworthy* for the plaintiff, and Mr. *Pouncepowder* for the defendant.

The cause of action was a box on the ear, which Mrs. *Soufe* gave Mrs. *Tongue* at a friend's tea table; and we shall go regularly on with the action, till we come to judgment on demurrer, beginning however with the declaration, as the process or copy of writ that we mentioned in our last example, was the kind used with regard to Mrs. *Soufe*, for a bill of *Middlesex*, *latitat*, or *capias*, and notice to it, will equally commence one kind of action as another; therefore, when the defendant has appeared and not before, the true cause of action comes out by the delivery of the declaration, the time for demurring being the same as that for pleading; we shall therefore now proceed to our example without further delay, supposing Mrs. *Soufe* to have been first served with a copy of a bill of *Middlesex*, and that by her attorney Mr. *Peter Pouncepowder* she had appeared thereto. (47)

PARTICULAR EXAMPLE,

Declaration. (48)

In the King's Bench.

[*Middlesex ff.*] *Deborah Tongue* complains of *Susan Soufe* being in the custody of the marshal of the
Marshalsea

(47) P. 7.

(48) Sometimes a declaration in assault has three counts, one for an assault only, the second for an assault and battery both, and

Defendant.

from the act of parliament in "inverted commas," with his *own opinion* at the bottom of it.

Well faith, said *Pouncepowder*, I never minded it; but however, it's live and learn, for really one has so many things in one's head at a time, that one cannot know every thing.

"*Nemo horis omnibus mortalium sapit.*"

Sir, good morning to you, don't neglect it be sure, but let me have it in time to deliver. "Oh! that you may depend on, Mr. *Pouncepowder*, good morning to you."

Within the four days the special pleader drew, and Mr. *Pouncepowder* filed, in the office of the clerk of the papers this special demurrer, which was as follows.

In the *King's Bench*.

[*Souse ats. (14) Tongue.*] And the said *Susan*, by *Peter Pouncepowder* her attorney, comes and defends the wrong and injury when, &c. and faith, That the said declaration and the matter therein contained, are not sufficient in law for the said *Deborah* to have or maintain her said action against the said *Susan*, to which declaration the said *Susan* hath no need, nor is she obliged by the law of the land to answer; wherefore, for want of a sufficient declaration in this behalf, the said *Susan* prays judgment, and that the said *Deborah* may be barred from having and maintaining her aforesaid action thereof against her, &c.

And the said *Susan*, according to the form of the statute in such case made and provided, shews to

(14) *Ats.* signifies at the suit of, it being usual amongst polite attorneys to put the names of their own clients first, except on briefs.

the

Plaintiff.

Marshalsea of our lord the now king before the king himself, for that (49) the said *Susan* on the day of in the year of our Lord to wit, at *Westminster*, in the said county, with force and arms, (50) to wit, with swords, staves, sticks and fists, made an assault on the said *Deborah*, and then and there beat, bruised, wounded, and ill treated the said *Deborah*, insomuch that her life was then and there greatly despaired of, and other wrongs to her then and there did, to the great damage of the said *Deborah*, and against the peace of our lord the now king, to the said *Deborah* her damage of one thousand pounds, and therefore she brings suit, &c.

Pledges to prosecute

{ *John Doe*,
and
Richard Roe.

The above declaration *Mr. Quilworthby* delivered to *Mr. Pouncepowder*, on the return of the writ (51) having a notice indorsed to plead in four days.

and the third for tearing the defendant's clothes; and some special pleaders add a fourth for a false imprisonment; always dividing the trespass into as many parts as they can.

(49) The word *whereas*, must not be inserted as, in case, for it is cause of Demurrer. *Morgan's Vade Mecum*, V. II. p. 233.

(50) The part here, printed in *Italics* being left out; was the cause of Demurrer.

(51) Because it is on the return of the writ that plaintiff is entitled to declare, but he may delay it, till the end of the term after; or if the defendant be not in custody, plaintiff may even then get further time by a rule.

See Defendant, Chapter I.

Defendant.

the court here the cause of demurrer following; to wit, that it doth not appear by the declaration of the said *Deborah*, that the said assault and other wrongs therein mentioned were committed with force and arms, to wit, with swords, staves, sticks and fists, therefore the said declaration is uncertain, insufficient, and wants form.

C. Quibbleprop.

Plaintiff.

CHAPTER II.

1. *How Quilworthy came to know his Declaration was demurred to.*

UPON the third day after filing the demurrer, while it rained as though heaven and earth were about to unite, *Quilworthy* with white silk stockings on his legs, and a green umbrella over his head, met *Pouncepowder* in an old clay-colour great coat, worsted stockings and half boots on, in the old court *Lincoln's-Inn*.

"*Pouncepowder*, good morning to you, were you at the club last night?" "No, said t'other, I drank so much punch last time, that faith I'm grown sick of it; yet I'd some thoughts of giving you a call, and then we'd have had a boiled chicken to ourselves comfortably. But what sort of a declaration was that you delivered me? damn me, I've demurred to it." "The devil you have, says *Quilworthy*, why sure the friendly terms we are on, I think you might have let me known."

"Know, why what the deuce would you know? I suppose you know you've a good client, that's knowledge enough for you. Don't you know what *Milton* says of woman?"

"God is thy law, thou mine, to know no more,
Is woman's happiest knowledge and her praise!"

"Now *Quilworthy*;

Thy client's thy law, thou mine, to know no more!
Is thy greatest happiness; and thy praise!

Give me your hand, my worthy; I've demurred to your declaration, at the office o'the clerk of the

Defendant.

CHAPTER II.

POUNCEPOWDER within the four days, the time mentioned in the rule and allowed by law, returned and paid for the demurrer book as charged, for if he had not so done, judgment might have been signed; and this *Quilworthy* would not have neglected, for although he appeared to take it all in good part, yet he was confoundedly mad, and the more so, as his client was the deuce of a scold, the music of whose tongue he feared ten thousand times more than the judgment of the court.

This matter made poor *Quilworthy* very uneasy, yet relying on the reasonableness of his case, he was determined to argue it; and *Pouncepowder* as firmly relied on his own judgment, of which he had a very high opinion, when backed by the sagacity of his special pleader.

the papers, there go and search, and satisfy yourself." *Plaintiff.*

For *Pouncepowder* was a poet, and thought himself equally clever at blank verse as at rhyme: "indeed he was famous for repeating *Milton* at the *Nag's Head*."

Quilworthy, though he did not half relish the joke, wished *Pouncepowder* good morning; and with his white silk stockings, *half mud and half margin*, set off full trot to the clerk of the papers, and there sure enough he found *Pouncepowder's* demurrer signed "*Quibbleprop*."

Upon this, home he posted for a copy of his declaration, and quickly returned to the clerk of the papers, and desired him to make up the issue.

Note. In the C. P. the attornies always make up the issues in law, as well as those in fact, themselves. This is the seventeenth variance between the practice of the two courts.

2. *Of the Joinder in Demurrer, and making up the Demurrer Book.*

This as usual was done by the clerk of the papers, who gave a rule in the margin for defendant to receive and return the demurrer book in four days.

Form of the Joinder in Demurrer.

And the said *Deborah* saith, that the declaration aforesaid and the matters therein contained, are sufficient in law for her the said *Deborah* to have her aforesaid action thereof maintained against the said *Susan*, which said declaration and the matters therein contained, the said *Deborah* is ready to verify and prove as the court shall award; and because the said *Susan* hath not answered the said declaration, the said
Deborah

Plaintiff.

Deborab prays judgment, and her damages by occasion thereof to be adjudged to her, &c. but because the court of our said lord the king now here is not yet advised what judgment to give of and concerning the premises, a day is given to the said parties that they be before the king at *Westminster*, on
next after

to hear their judgment thereon, for that the court of our said lord the king now here is not yet advised thereof, &c.

Of the delivery of Demurrer Book.

No sooner did *Quilworthy* receive the demurrer book from the clerk of the papers, that he forthwith delivered it to *Pouncepowder*, charging on the back 4*d.* a folio for the declaration, and 8*d.* a folio for the plea and joinder, adding also the amount of the stamps.

See Defendant, Chapter II.

CHAPTER III.

1. *Of entering the Proceedings on the Roll.*

THE proceedings in demurrer must be entered on the issue roll before hearing, as the roll must be produced in court, no record being made up; but the judges are furnished with paper books instead, which in short are copies of the pleadings.

Mr. *Quilworthy* therefore entered the whole proceedings on the roll, beginning with warrants of attorney, then his memorandum of the term, and joinder thereto; and all this he then caused to be entered with the clerk of the judgments.

2. *Brief to Counsel to move for a Consilium.*

The next step taken by Mr. *Quilworthy* was to give a brief to counsel to *move for a consilium*; for this purpose he pitched upon Mr. *Thickpole*, for he knew no one so able; to him therefore he delivered a brief with the fee of half a guinea, (52) and a day was appointed accordingly to argue the demurrer. Then Mr. *Quilworthy* with all the anxiety upon his mind, which a cause *in fieri* naturally creates; took his roll to the clerk of the papers, who marked it read, received 1s. 6d. and signed his initials on Mr. *Thickpole's* brief.

Then from the clerk of the papers with this same brief, did Mr. *Quilworthy* proceed to the clerk of

(52) On the day of argument another fee is given, which is in proportion to the nature of the case, though never less than a guinea.

Defendant.

CHAPTER III.

POUNCEPOWDER on receiving the copy of the rule for a *consilium*, without delay, made up his two copies of demurrer book; (52) and two days before argument, he delivered them at the judges' chambers accordingly before eight o'clock in the evening, and a beautiful evening it was, for *Pouncepowder* went afterwards to his club, boasted of his demurrer, and recited some lines from *Milton* relative to the fall of man, and then concluded with the celebrated soliloquy in the tragedy of *Hamlet*,

"To be, or not to be! That is the question!"

He then departed while the moon shone bright, and by the chaste rays of her silver countenance he was lighted home, half mad with poetry and half drunk with punch, so that going down *Chancery Lane* he stopped short, and thus broke forth,

"Alas, this lane! by name 'tis *Chanc'ry* called,
 "Tho' some dwell here, who practice common law?
 "Yet, cancel is the word; and pocket all;
 "For who can't cheat, he is no knave at all.
 "Pouncepowder proceed, these errors to correct;
 "Whene'er thou can'st demur! do not neglect!"

Thus with punch, poetry and special pleading, *Pouncepowder* at length reached his chambers.

(15) The other two being made up by plaintiff's attorney.

Plaintiff.

the *Rules*, and giving it to him, he drew a rule and received four shillings.

After all these revolutions from office to office, Mr. *Quilworthy* made a retrograde motion, for he returned to the clerk of the papers again, all the way cursing *Pouncepowder's* poetry, and there did this enraged man set down the cause for argument, paying the clerk of the papers one shilling more.

Rule for Consilium.

Mr. *Quilworthy* having drawn up his rule with the clerk of the rules, made a copy of it, and served it on his adversary Mr. *Pouncepowder*, who made his two copies of demurrer book, which he left at the judges' chambers.

See Defendant, Chapter III.

CHAPTER IV.

ARGUMENT on DEMURRER. (53)

THE day of argument being come, the court ordered Mr. *Quibbleprop* on the part of the *defendant* to begin, who quoting a whole catalogue of cases, the court were perfectly satisfied as to the legality of the objection.

Mr. *Thickpole* for the *plaintiff* then wished to be heard upon the reason of the case, he observed "the demurrer was, because the declaration did not mention that the assault was committed with force and arms, to wit, with *swords, staves, sticks and fists*."

He wished therefore to call their lordships' attention to the fact, which he said was a box on the ear and no more. "*The fact is out of the question.*"

Now pray Mr. *Quibbleprop* don't interrupt me, I did not interrupt you in your speech, but let you go on till you had finished.

The court were all attention and Mr. Thickpole continued.

"My client, my lords, is a lady of the most unblemished reputation, and in the course of her life never told a falsehood, she had not therefore the smallest idea of stating what was not true. Good God! is it customary in this country for the women to wear swords? is it usual for them to play at single stick, or break each others heads with barbers' poles; or are they grown so masculine as to turn

(53) All special causes must be set down four days exclusive before the day of argument, of which the attorney on the other side must have notice; and they cannot be put off, except by the special order of the court grounded on a motion supported by affidavit, and made two days before.

out

out bruisers, like *Ward* and *Mendoza*. I hope not, continues Mr. *Thickpole*, I hope not for the honour of the sex, for whose delicacy and good manners he said he should even be an advocate."

"Then I wish you'd make your client keep a better tongue in her head, for had it not been for that, this would not have happened."

Now pray Mr. *Quibbleprop* be silent, Mr. *Thickpole*'s coming to the point.

"My lords, the ground upon which I support my declaration is, that if it be not necessary to state what actually *did* happen, I mean the manner of giving the assault, as the box on the ear for instance, surely it can never be necessary to state what did *not* happen; namely, that it was committed with force and arms, to wit, with swords, staves, sticks and fists. This my lords strikes me to be such strong reasoning on the subject, that I shall not add one word more, except that I shall rely on the candour of the court.

The judges could only lament that the law was so, they observed it was their place to say what law was, not to say what it ought to be; to alter the laws was the business of the legislature, to pronounce them the duty of the judges.

Mr. *Quibbleprop* said the demurrer was only as to form.

"Form or substance, said Mr. *Thickpole*, it will be the same thing to my client, for she must pay the costs."

At length, judgment was given for the defendant, (54) so that *Pouncepowder* established his de-

(54) Whenever judgment is given on demurrer, it is usual for the victorious attorney to make out his bill, give notice of taxation, and then tax his costs; and upon their being paid, the losing party may go on afresh.

: murrer,

ARGUMENT ON DEMURRER. 79

murrer, while *Quilworthy* scratched his head at the misfortune.

Note. We shall not now trouble the reader any further, with the variance between the practice of the two courts. Suffice only to observe, that, "in the Common Action not Bailable," taken both ways, i. e. as well by plea as by demurrer; the courts of *King's Bench* and *Common Pleas*, differ from each other in no less than *seventeen particulars*.

B O O K III.

C H A P T E R I.

Of the COMMON ACTION, Bailable.

Preliminary Observations.

IN our Common Action *not* bailable, we began with a bill of *Middlesex*; but in order to shew the distinction between the two writs, we shall begin our bailable action with a *latitat*, as a bill of *Middlesex* is rather an incomplete kind of writ, as wanting the teste; but a *latitat* has all its proper parts.

Bailable process also differs from that not bailable, inasmuch, as the former has an *ac etiam* added to it, and the latter a *notice*.

So that a *latitat* with a notice like the one we added to the bill of *Middlesex*, may be a common process; and *vice versa*, a bill of *Middlesex*, with an *ac etiam* instead of a notice, may be made a bailable writ.

The attorney's name, his place of abode, and day of the month on which the writ was sued out, must be written on the back of a bailable, as well as on the back of a writ not bailable, together with the addition of the sum sworn to.

As no person can be arrested, unless the plaintiff or some person for him who knows the fact, make an affidavit of the debt as due to the plaintiff, which cannot now be for a less sum than 10*l*. and in case a defendant be arrested by any other writ than a process; that is, if he be arrested by original, the plaintiff

Defendant.

CHAPTER I.

Preliminary Observations.

THE first thing which a defendant ought to do when he is arrested, is to examine the return of the writ, which always appears by the sheriff's warrant to the officer; the reason of this is, that he may distinctly know what time he has to put in bail *above*, for if this be neglected, the bail below, *i. e.* the persons security to the sheriff will become fixed; when the plaintiff may take an *assignment* from the sheriff of the *bail bond*, and bring actions as well against the bail as the principal, declaring on the penalty, though if such a misfortune happen, the court will mostly relieve the bail and principal too upon motion, upon condition of their putting in and perfecting bail within a given time; therefore necessarily attended with an expence that would often go a great way in the discharge of the debt.

PARTICULAR EXAMPLE.

1. *Of putting in Bail below. (16)*

This is done by two substantial house-keepers, jointly with the defendant as principal, executing a bond to the sheriff, conditioned to pay the debt and costs jointly or severally, *if the defendant do not put in bail above.*

(16) The attorney must take a warrant to defend, the same as in the action not bailable.

2. *Bail*

Plaintiff.
tiff will be liable to pay the additional costs out of his own pocket, unless the debt amount to 50*l.* for which reason original writs (55) are seldom sued out for a less sum.

The *latitat* always supposes that a bill of *Middlesex* has been before sued out, and that the defendant has left one county, and *latitat* "hurks and wanders" in another, *i. e.* that of the sheriff to whom the *latitat* is directed.

The *latitat* therefore is the proper writ to issue, when the defendant's residence is *not* in *Middlesex*.

We shall now proceed to our particular example of an arrest by *latitat* in the *K. B.* supposing *the cause of action to be the same as in our action not bailable*; and for perspicuity sake we shall also use the terms plaintiff and defendant instead of names.

PARTICULAR EXAMPLE.

1. *Affidavit.*

The plaintiff of *Bond Street*, in the liberty of *Westminster*, in the county of *Middlesex*, watch-maker, maketh oath and saith, that the defendant is justly indebted to him, this deponent, in the sum of thirty pounds, five shillings, for the work and labour (56) of this deponent done and performed for the said defendant, and for materials found in the said work.

(55) See Original; in the Alphabetical Chapter.

(56) If the cause of action be any other than for something of the nature of a debt, then defendant cannot be held to bail, except by a *judge's order*, to obtain which an affidavit must be first made; as in an action of assault for instance, that the defendant committed a certain assault upon the plaintiff, and describing the wounds with the effects already sprung, or likely to spring therefrom.

This

BAIL ABOVE.

Defendant.

2. *Bail above.*

The persons who become *bail above*, may or may not be, the same as were *bail below*; but if they be the same, (17) they are differently considered, because the obligation is different, the one being to the sheriff and the other to the plaintiff, and this bail to the plaintiff must either pay the debt, if a verdict go against the defendant, or deliver up his body that it may be charged in execution; nor are these bail below proceeded against the same as the bail above, but by *scire facias*. (18)

3. *When to be put in, Defendant being arrested in London or Middlesex.*

In K. B.

Bail above must be put in four days after the return of the writ, which according to our example would have been required on the *Friday* (the days being exclusive) as on the *Saturday*, an assignment might have been taken of the bail-bond.

In C. P.

The defendant has till eight days after the return; that is, till four days after the appearance day, or *quarto die post*.

(17) In *K. B.* they cannot be excepted against, but in *C. P.* they may.

(18) See bail post.

4. *When*

A R R E S T.

Plaintiff.

This is written on a *treble six-penny* stamp paper, and then sworn before the proper officer.

2. *Writ.*

Then the writ is bought at the stationers and the blanks filled up, which is afterwards with the warrant to prosecute and *præcipe*, taken to the *K. B.* office to be signed; but the *latitat* must be sealed as well, and it is in this form.

3. *Latitat.*

George the Third, by the Grace of God, of *Great Britain, France and Ireland*, King, defender of the faith, and so forth. To the sheriffs of *London* greeting. Whereas we lately commanded our sheriff of *Middlesex* that he should take the defendant, and *Richard Roe*, (57) if they might be found in his bailiwick, and safely keep them, so that he might have their bodies before us at *Westminster*, at a certain day now past, to answer the plaintiff in a plea of trespass.

Ac etiam.

[And also to a bill of the said plaintiff, to be exhibited against the said defendant for 66*l.* 10*s.* upon promises according to the custom of our court before us,] and our said sheriff of *Middlesex* at that day returned to us, that the said defendant and *Richard* were not found in his bailiwick; whereupon on behalf of the aforesaid plaintiff, it is sufficiently testified in our court before us, that the said defendant and *Richard* do lurk and secrete themselves in your

(57) These writs, as well as the process notailable, being printed in the plural number,

county :

Defendant.

4. *When the Arrest is not in London or Middlesex.*

In K. B.

The defendant has six days after the return of the writ.

In C. P.

He has eight days after the appearance day.]

5. *Of the Manner of putting in Bail above.*

This is no other than by buying a *special* bail-piece at the stationer's, and filling up the blanks in it; and that no mistake should happen, it is always safest to get an abstract of the writ, which may be had at the office where it was signed, or at the sheriff's office. The defendant's attorney takes the bail and bail-piece to a judge's chambers, whose clerk takes the recognisance.

In *C. P.* the attorney also takes the *filacer* with him, in whose book the recognisance is entered.

Special

Plaintiff.

county: therefore we command you that you take them, if they be found in your bailiwick, and safely keep them, so that you have their bodies before us, at *Westminster*, on *Monday* next after the morrow of all souls, (58) to answer the said plaintiff of the plea and bill aforesaid; and have you then there this writ, witness *Lloyd*, Lord *Kenyon*, (59) at *Westminster*, this (any day before the writ sued out, but in C. P. it must be on some day in term, and fifteen days before the return) in the thirty-second year of our reign.

Stormont and Way.

Plaintiff's attorney's name and residence, and day of the month when the writ is sued out. Oath for 30*l.* 5*s.* (60)

Præcipe for the Office.

London, *latitat* for plaintiff against defendant, *Tr. Ca.* for 66*l.* 10*s.* upon promises, returnable on *Monday* next after the Morrow of all Souls.

November 1, 1791.

Oath for 30*l.* 5*s.*

— Attorney.

(58) Now suppose this instead of being a *latitat* in *K. B.* had been a *capias* in *C. P.* the return instead of being on *Monday* next, after the morrow of *All Souls*, which last year was the 7th of *November*, the 1st day of *Michaelmas* term; it would have been on the morrow of *All Souls* itself, which is the *Effoin* day before that term, *i. e.* the first of the four days marked in the almanack.

(59) The teste, which is a bill of *Middlesex* is omitted.

(60) The indorsement altogether.

Thus

Defendant.

Special Bail-Piece, according to our Example.

*Michaelmas Term, in the Thirty-second Year
of the Reign of King George the Third.*

— Stormont and Way.

[*Middlesex, to wit.*] The defendant is delivered to bail on a *Cepi Corpus* (19)
to

One bail's name, where he lives and his calling,

and

The other bail's name, where he lives and his calling.

At the suit of
The Plaintiff.

— Attorney,
Sworn to 30^l. 5^s.

Bail being thus put in, plaintiff's attorney must have notice given him of the time when, with the names and descriptions of the bail, and at what judge's chambers their recognizance was taken; and if they be the same as were bail to the sheriff, it should be mentioned.

The reason of this notice is, that if the plaintiff should not be satisfied with the bails' responsibility, he may except against them.

(19) The sheriff's return that he has taken the body.

G

Plaintiff.

Thus the writ being completely sued out, it is taken to the Sheriff's office, where the plaintiff's attorney gets a warrant on it, directed to one or more bailiffs to arrest the defendant.

3. *Of the Alias and Pluries.*

If the defendant cannot be taken on the first writ, before or on the return thereof, the plaintiff must be at the expense of suing out an *alias* or second writ; and if before, or on the return of that, he cannot be taken, he must then be at the expense of suing out a third writ, called a *pluries*; and if he cannot take defendant on that, before or on the day of the return day, then he must be at the expense of another *pluries*, and so on from *pluries* to *pluries* till he can take him.

See Defendant, Chapter I.

CHAPTER II.

Of Exception and Justification.

CHAPTER II.

Of EXCEPTION against the BAIL.

Preliminary Observations.

THIS must be taken within twenty days after notice of putting in bail, in the bail-book, at the judge's chambers, if in *K. B.*; but in *C. P.* in the *filacer's*, and notice of such exception being given to the defendant's attorney in writing, defendant's bail must then justify.

Note. When defendant has put in and justified bail above, those who were bail below become quite exonerated. In country causes, bail is put in before a commissioner, who transmits the bail-piece to town, that it may be allowed by a judge of the court, and this done, the agent in town must file it; but the twenty days of exception do not begin to run till after the bail-piece *be* filed.

See Defendant, Chapter II.

Defendant.

CHAPTER II.

OF JUSTIFYING BAIL.

Preliminary Observations.

IF the notice of exception be given in term, either the same bail or others must justify in four days after; if not the same, the other bail are called *added*; and of which notice must be given to the plaintiff's attorney, mentioning who the bail to be added are. (20)

If the same bail justify, only one day's notice is necessary; but if others are to be added, then two days must be given; however, let us proceed in our

Particular Example.

First, giving notice of the old bail justifying.

Plaintiff against Defendant.

In the *King's Bench*.

Take notice that the bail already put in in this cause, and of whom you have had notice, will on (day of the week) next, justify themselves in open court as good bail, for the defendant; dated this (day of the month) 1791.

Yours, &c.

Attorney for the defendant.

To Mr. Attorney for the plaintiff.

Note. An affidavit of the service of this notice must be made, and annexed to the counsel's brief.

(20) Their names may be put on the bail-biece, the morning of justification in the treasury, but the bail-piece in either case should be got of the proper officer the evening before.

2. The

Defendant.

2. The morning of justification being come, the defendant's attorney gives brief to counsel, with instructions "to move to justify." (21)

And upon the bail being sworn, he asks them whether they be worth double the sum they offer themselves as a security for, when all their debts are paid; upon which the counsel for the plaintiff usually cross examines them as to this point, in which if they do not prevaricate they are received as good bail, otherwise the court reject them.

3. *Rule for allowance of Bail.*

This is got at the office of the clerk of the rules the same evening, and a copy thereof is served upon the plaintiff's attorney.

(21) Sometimes the plaintiff's attorney will consent for the bail to justify at the judge's chambers, for which consent he has half a guinea.

Plaintiff.

CHAPTER III.

Of the DECLARATION.

THIS is in all respects the *same* as in the action *not* bailable, and as in that, our defendant defended the suit; in this, we shall let him suffer judgment to go by default, permitting the plaintiff to recover his damages upon inquiry before the sheriff.

CHAPTER IV.

*Of JUDGMENT by DEFAULT.**Preliminary Observations.*

THIS is also called interlocutory judgment, in opposition to final.

But sometimes judgment by default is final in the first instance, which is always the case where the action is in debt, or covenant, brought for some sum certain; as for instance, to recover a sum of money due upon a bond, or rent upon a lease, which is different to a tradesman's bill or the like; because in the former case the jury have only to try whether the deed in question were executed by the defendant; but in the latter, they have not only to enquire if the work were done, or the goods delivered, but they have also to assess the value of such work or goods; therefore, all that a defendant admits by suffering a judgment by default, is an indefinite sum for work and labour, goods sold and delivered, &c. but the value thereof must be yet proved

Plaintiff.

proved to a jury in a court, wherein the sheriff or his deputy sits as judge. (61)

Note. Upon inquiry, any damages however small, always carry costs.

PARTICULAR EXAMPLE.

I. *Rule to Plead.* (62)

This may be given any time in term, or within four days after, even before the time of pleading is expired; therefore, instead of supposing defendant to have pleaded as in our first example, we shall give a rule to plead, for which a note is made on a slip of paper, thus,

[Plaintiff against Defendant.] Rule to plead.
11th November, 1791. Plaintiff's Attorney.

This being taken to the office of the clerk of the rules, he enters it in his book, and it expires in four days, including the day on which it is given, and *Sunday* counts; (63) therefore, judgment may be

(61) Though sometimes writs of inquiry are executed before the chief-justice at *nisi prius*, or judge at the assizes; but leave for this must always be obtained by motion in court, so that unless the nature of the case be of that kind, that the sheriff might not be thought competent to determine it, the court will refuse the application.

(62) Whenever either party neglects to proceed as fast as the rules of the court permit, his adversary may force him by rules, and thence go on to judgment by default or *non pro's*, as the case may be.

(63) Unless it be the first or last day, the like of any other holiday on which the court does not sit.

signed

Plaintiff.

signed the day after; but before this can be done, there must also be made,

2. *A demand of plea, (64) thus,*

Plaintiff against Defendant.] The plaintiff demands a plea in this cause.

Yours, &c.

Plaintiff's attorney.

To Mr. Defendant's attorney.

But this however may be delivered to defendant's attorney, *before* the expiration of rule to plead; but if neglected, judgment by default may be set aside on motion. (65)

3. *Of searching for the Plea.*

In case no plea be delivered, notwithstanding the rule and demand as above, then before judgment is signed,

In B. R.

Search at the clerk of the judgments' office; and if no plea be found there, then see if a special plea be not filed with the clerk of the papers.

In C. P.

Search at the prothonotary's.

(64) If time for pleading be expired, defendant has only till the next afternoon after the day of demand.

(65) Though in actions *not* bailable, where the defendant permits the plaintiff to appear for him according to the statute, and the declaration is filed in the office *no* such demand is necessary.

4. *Of*

Plaintiff.

4. *Of the Manner of signing it.*

Interlocutory judgment is signed not only on parchment, but as well on paper; the former is a roll, got at the *King's Bench* office for that court, and at the prothonotary's for *C. P.*

On this roll, warrants of attorney for the plaintiff and defendant must be entered, and a memorandum of the term in which the declaration was delivered or filed. But upon the paper, which is a treble-penny stamped one, the memorandum *only* need be entered.

This is however if the judgment be interlocutory. As should it be final, *i. e.* should no writ of enquiry be necessary, instead of a treble-penny, the stamp is half-a crown. Let us however continue our example, in which the action being in assumpsit, the judgment is interlocutory of course.

5. *Parchment Roll. (66)*

Of the term of *Saint Michael*, 32d. of *George the Third*, witness *Lloyd, Lord Kenyon*.

[*London.*] The plaintiff puts in his place his attorney against the defendant, in a plea of trespass on the case. (67)

[*London, ff.*] The said defendant puts in his place his attorney, at the suit of the said plaintiff in the plea aforesaid. (68)

(66) This which is called the Judgment Roll, is analogous to the issue Roll. P. 32.

(67) The nature of the action should always be expressed.

(68) In *C. P.* warrants of attorney are made out on a piece of parchment unstamped, and filed with the clerk of the warrants.

[*London,*

Plaintiff.

[*London, to wit.*] Be it remembered, that on *Monday* next after the *Morrow of all Souls*, in this same term, before our lord the king, at *Westminster*, comes the plaintiff by his attorney, and brings into the court of our said lord the king, before the king himself, now here, his certain bill against the defendant being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself of a plea of trespass on the case, and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit, The plaintiff complains of the defendant being in the custody of the marshal of the *Marshalsea* of our lord the now king, &c.

And the said defendant by his attorney comes and defends the force and injury, when, &c. and says nothing in bar or preclusion of the said action of the said plaintiff, whereby the said plaintiff remains therein undefended against the said defendant, for which the said plaintiff ought to recover against the said defendant his damages by occasion of the premises, but because it is unknown to the court of our said lord the king now here, what damages the said plaintiff has sustained, by reason of the premises aforesaid; It is therefore commanded to the sheriffs, that by the oath of twelve good and lawful men of their bailiwick, they diligently enquire what damages the said plaintiff hath sustained, as well by the means aforesaid, as for his costs and charges by him about his suit in this behalf expended; and that he send the inquisition, which he shall thereupon take to our lord the king, at *Westminster*, on

next after

under their seal,

and the seals of those by whose oaths he shall take the said inquisition, together with the writ of our said lord the king to him thereupon directed, the same day is given to the said plaintiff at the same place;

place; at which day before our lord the king, at *Westminster*, came the said plaintiff by his said attorney. *Plaintiff.*

6. *The Judgment Paper.*

On this enter only the memorandum part. (69)

7. *Of getting the Above signed.*

Both the roll and judgment paper are then taken to the clerk of the judgments for him to sign.

8. *Of the Writ of Inquiry.*

Of the execution of this, the defendant or his attorney, as the case may be, must have eight days notice if the defendant's residence be within forty miles of *London*, and the venue laid in *London* or *Middlesex*; but if the venue be laid in the country, then ten days notice.

And whether the venue be in *Middlesex* or not, provided the residence of the defendant be above that distance, he must then have fourteen days notice. (70)

And when no proceedings have been had for four terms, a whole term's notice is necessary. (71)

(69) But the proceedings at length should be entered afterwards notwithstanding.

(70) These days are all reckoned exclusive of the day of delivery of such notice, yet though the writ be executed on the return day, it is notwithstanding good. Lord Raym. 1449.

(71) I believe where no proceedings have been had for four terms, in all cases of time whatever, a term is allowed; but there may be cases wherein it is necessary to take out a summons to obtain it.

Plaintiff.

Particular Example.

Notice. (72)

Take notice that a writ of inquiry of damage, in this cause, will be executed on (day of the week and month when,) between the hour of ten and twelve in the forenoon of the same day, at the *Guildball* of the city of *London*, dated the 15th day of *February*, 1791.

Your's &c.

Plaintiff's Attorney.

To Mr. Defendant's attorney.

Form of the Writ. (73)

George the Third by the grace of God, of *Great Britain, France and Ireland*, king, defender of the faith, &c. to the sheriffs of *London* greeting, Whereas the plaintiff lately in our court before us at *Westminster*, by bill, without our writ impleaded the defendant, being in the custody of the marshal of the *Marshalsea* of our Lord the now king, before the king himself; for that whereas (here the declaration is set forth *verbatim*) and such proceedings were thereupon had in our said court before us, that the

(72) This may be countermanded the same as notice of trial, to which it is analogous, and if the writ be not executed according to notice not countermanded, costs must be paid by the plaintiff for his neglect in like manner, as for not going to trial agreeable to his own proposal.

(73) This writ, is to the sheriff on inquiry, what the record is to the judge on trial; it is engrossed on a 2s. 6d. stamped parchment, and the return of it is guided in both courts as in other writs.

said

Plaintiff.

said plaintiff ought to recover his damages by means of the premises; but because it is unknown to our court before us, what damages the said plaintiff hath sustained by means of the premises, and for his costs and charges by him about his suit in this behalf expended, make appear to us at *Westminster*, on (74) next after, the inquisition which you thereupon take under your seal, and the seals of those by whose oath you shall take that inquisition, and have then there this writ: Witness *Lloyd*, Lord *Kenyon*, at *Westminster*, the day of in the 32d year of our reign,

*Stormont and Way.*9. *Execution of Inquiry.*

The plaintiff upon inquiry, may state his case to the jury, the same as on trial, and in like manner subpoena and examine witnesses.

So in the same manner may the defendant defend himself, but all he can either say by his counsel, or prove by his witnesses, can do no more than mitigate the damages, the cause of action for want of a plea standing admitted. As to our

Particular Example.

We shall suppose that the plaintiff obtained a verdict for his whole debt 30*l.* 5*s.* by the same evi-

(74) The return may be the day on which inquiry is executed, or on any day after in the *King's Bench*; but in the *C. P.* it cannot be till the first fixed return after.

(75) The writ being thus made out, must be left at the sheriff's office two days before it is intended to be executed, and after the execution of it, the plaintiff's attorney fetches it from thence again, having the sheriff's return thereto.

dence.

Plaintiff.

dence as on trial. And that he afterwards taxed his costs, and upon the return of the writ (76) gave a similar rule for judgment as after verdict in court.

10. *Continuance on the Roll.*

The proceedings upon the roll ought to be now continued and made complete, therefore we shall continue our

Particular Example.

First, supposing the declaration and interlocutory judgment to be as above entered on the roll at full length, for which reason on a new line let us enter the return of the inquisition.

And the sheriffs to wit, Esq;
and Esq; sheriffs of the said city,
returned a certain inquisition indented, taken before
them at the *Guildhall*, in the city of *London*, in the
parish of *Saint Lawrence, Jury*, in the ward of *Cbeap*,
in the same city, on the day of
in the 32d. year of the reign of our soverign lord
the now king, by the oath of twelve honest and
lawful men of their bailiwick, by which it is found
that the said plaintiff hath sustained damages, by oc-
casion of the premises over and above his costs and
charges to 30*l.* 5*s.* and for those costs and charges
to 1*l.* 9*s.* 4*d.* (77)

[*Judgment.*] Therefore it is considered that the
said plaintiff recover against the said defendant his

(76) The return of the writ of inquiry in judgment by de-
fault, is analogous to the return of the venue, when the record
is made up for trial.

(77) This is similar to the forty shillings increased costs on
verdict.

damages

Plaintiff.

damages aforesaid, by the said inquisition above found, and also 14*l.* (78) for his said costs and charges by the court of our said lord the king now here adjudged of increase to the said plaintiff by his assent, which damages in the whole amount to 45*l.* 14*s.* 4*d.* and the plaintiff in mercy, &c.

Note. But if the declaration be of one term, and interlocutory judgment of another, there must be an imparlance entered on the roll, to continue the pleadings over from the delivery of the declaration to the signing; and this like all other final judgments is signed by the master on the taxation of costs.

Therefore as to suing out execution. (79) it is the same as in other cases. See p. 53.

(78) The usual costs on inquiry being from about 12*l.* to 16*l.* we have taken the medium.

(79) And before execution, the same four days are allowed to set judgment aside if irregular, as to move for a new trial in case of verdict.

BOOK IV.

ERROR. (80)

Preliminary Observations.

A Suit commenced in a court of error, is a provisional supersession of execution, in some other court wherein a judgment has been before obtained. But error is not brought upon matter of fact, that remains as it was decided in the court below, it is matter of record or point of law only, upon which error can be heard and established.

When proceedings in *K. B.* are commenced by common process, or bailable process, *not* original, the writ of error is brought in the Exchequer Chamber, and from thence may be carried to the House of Lords.

But if the proceedings be begun by original, then it must be brought into the house of Lords in the first instance.

And when the first action is in *C. P.* then the writ of error must be brought in the *King's Bench*.

Suits in error were no doubt originally established with an extremely good design; but like many more of our laws, arose from a weak judgment, shallow speculation, or the ignorance of the times which gave birth to them; though to be sure in theory, being the right of appeal, they appear exceedingly proper; but I am sorry to say, that in practice they

(80) A writ of error brought and prosecuted, will keep off execution for four terms. It is very common to let judgment go by default, and then bring a writ of error, because (except in a few cases) bail need *not* be given; but when a verdict is obtained in court, *i. e.* after issue joined, it is otherwise.

H are

98 PRELIMINARY OBSERVATIONS.

are generally perverted to the worst of purposes, for what can be worse than for a litigious person to have an opportunity of harrassing his adversary, or in other words, for a worthless debtor to injure his honest creditor, nay in the end perhaps ruin himself? Clear therefore it is, according to practice and experience, which are the only proper standards whereby to decide every thing, where one good effect results from writs of error, we may fairly say, at least fifty bad ones do, being the last resource of quibble and chicanery. About facts, it is no wonder there should be so many disputes, but *law* should be plain and indisputable, and where upon such ground it is necessary to appeal, the proceeding should be as simple as possible, and the expence quite trifling.

Error is after verdict, what demurrer is before; it is therefore of two kinds, general and special, the latter assigning a cause why it is brought, but the former shewing no cause at all.

The limitation of action is any time within twenty years, (81) but this is provided execution have not issued in the court below, to prevent which it is therefore prudent to sue out the writ as soon as possible, after the original cause is known to be lost. (82)

The plaintiff in error must give bail in *all cases after verdict*; and in actions of debt upon bond, (83) although judgment go by default.

But if judgment *de bonis testatoris* be given against an executor or administrator, he is neither liable to put in bail, nor pay costs; but it is otherwise if the

(81) 10 & 11 W. 3 & 14.

(82) Proceedings in the original action are not stayed till the service of the allowance of the writ of error.

(83) For the payment of specific sums.

judgment

PRELIMINARY OBSERVATIONS. 99

judgment be *de bonis propriis*: 1 Lev. 245. 1 Sid. 368.

As to the time of putting in bail, it is within four days after the delivery of the writ to the clerk of the errors, who is the proper officer to attend you with the bail to the judge's chambers.

Nothing further respecting bail need be observed, for as to the manner of exception (84) and justifying, it is the same as in other cases.

We shall therefore proceed with our *particular example*, (85) as though judgment had gone by de-

(84) But the rule for *better bail* is got of the clerk of the errors, who marks the bail-piece after justification.

(85) But we shall not carry our cause in error further than the Exchequer Chamber, that being completely sufficient to tire the general of suitors, though some there are who go to the House of Lords notwithstanding; if therefore any of my readers should be of that litigious turn, or that *their case* really require further appeal; *though a particular example* might have appeared superfluous, I have nevertheless added an *abstract of the proceedings in error in parliament*.

The writ is obtained of the curfitor, and made returnable immediately when parliament is sitting; *but if in vacation*, at the next parliament. The clerk of the errors in the K. B. makes out the allowance, a copy of which is served on your adversary. Bail is also (if required) put in with the clerk of the errors. The record must be carried up by the chief justice to be examined. When the transcript is carried up, defendant must get a peer to move for plaintiff to assign errors; the time allowed is commonly eight days, and if neglected the clerk of the parliament issues a *non pros*. If a plea of diminution be put in, the *certiorari* must be returned within ten days after. When errors are assigned, then the plaintiff must get a peer to move, 'for defendant to appear and argue them.' And issue being joined, a peer moves for 'a day to hear errors.' At this time both parties attend, and their counsel are called to the bar, but they are restricted to two on each side. The judgment then whatever it be, is at last entered of record by the transcript being sent back to K. B.

Note. A writ of error *abates* by a *dissolution*, but *not* by a *prorogation*.

100. PRELIMINARY OBSERVATIONS.

fault upon the arrest; and the judgment in the court below, being affirmed by the court above, we shall then shew the proceedings against the bail in the original action, supposing the principal to run away, *a case which often happens*: this being one of the many bad uses to which writs of error are applied, merely to give the losing party time to arrange his affairs, that he may make off with as little prejudice as possible to himself; though no matter with how much to other persons, whether to his bail, to whom he owes his provisional liberty, or to his creditor to whom perhaps he is indebted in the greatest obligations. If any part of our law be erroneous at all, that respecting error is so in the highest degree.

CHAPTER I.

EXAMPLE of a SUIT in ERROR.

CHAPTER I.

PARTICULAR EXAMPLE.

1. *Of the Rule to transcribe.*

BUT first the defendant's attorney must search to see when the writ of error is returnable, and if in the same term in which the allowance is made, he proceeds by getting a rule at the office of the clerk of the errors, for the plaintiff in error to transcribe. Of this he then makes a copy, and serves it on his adversary. (22)

Next he makes a copy of all the proceedings, or which is the better way, *he leaves the issue roll*, being quite complete, *with the clerk of the errors*, who from this makes the transcript (23) of the proceedings in the court below.

When the clerk of the errors has made the transcript, he delivers it either to the attorney for the defendant in error, or to the proper officer, in order that it may be examined in the treasury at *Westminster*.

The transcript being at length complete, the clerk of the errors of the court below, delivers it over to the clerk of the errors of the court above. (24)

(22) This rule expires in eight days after service.

(23) Which must be paid for by the plaintiff in error, and that before the rule expires if insisted on, for the time therein is to accommodate the officer, not the plaintiff.

(24) From this time the proceedings are wholly removed from the court below, till the suit in error be finally decided.

2. *Rule*

CHAPTER I.

PARTICULAR EXAMPLE. (86)

1. *The Præcipe.*

[*London.*] Writ of error for the defendant (*in the original action*) at the suit of the plaintiff on a judgment in case, given in the *King's Bench* by bill *returnable*

—Attorney.

The above is taken to the curfitor of the county in which the venue was laid, who makes out the writ by the time that the attorney requires him, which must depend upon the time, in which his client is liable to be taken in execution. This time is always the shortest, when the action is tried some sitting in term, and not the sittings after, which renders it necessary in some cases where success is doubted, even to bespeak the writ of error before trial.

Note. The teste of the writ is the day the præcipe is left with the curfitor, but the return must not be till after final judgment.

2. *Of the Allowance.*

As soon as the attorney can get the writ from the curfitor, he takes it to the clerk of the errors, who gives him a *note of the allowance of it*; the attorney

(86) We have put our example on the defendant side, because in it, the plaintiff in error was defendant in the original action.

then

2. *Rule to alledge Diminution.* (25)

This rule requires the plaintiff in error to shew wherein the proceedings in the original action were deficient in point of number, and which of course not being given till after the return of the writ and transcript brought in, brings us over to the *second term*.

Of this rule a copy is then served on the attorney for the plaintiff in error, who must then call at the office of the clerk of the errors, and pay the sum demanded; as in case he fail therein, the clerk of the errors himself may sign a *non pros*, and thus will end the writ of error.

But the sum demanded being paid by plaintiff in error, the next step taken by defendant in error, is to give the plaintiff, a

3. *Rule to assign Errors.*

This differs from the rule to alledge diminution, in as much as that is for the plaintiff to shew if the original action were deficient in the number of its parts; but in that respect the plaintiff in error having found no fault, this rule requires him to shew, what (if any thing) was amiss in those proceedings which actually were had.

This rule is got of the clerk of the errors in the court above, and is taken out the *third term*; a copy thereof must be served on the plaintiff's attorney, who within *eight days* after must assign errors.

Now as it has been already observed, that error is after verdict, what demurrer is before, the errors assigned may be either general or special; as therefore our demurrer in *Tongue* against *Soufe* was special, we shall to vary the matter here, use errors general.

(25) This is also an eight day rule.

then makes a copy of this and serves it on his adversary, at the same time shewing him the original writ.

And this is a *superfedeas* of all proceedings in the original action, until the suit in error be finally determined. (87)

The usual time of serving the allowance, (88) is on the taxation of costs; but it may be served before, notwithstanding that its operation does not effectually commence, till judgment signed in the original action.

(87) But if plaintiff in error delay any thing afterwards, he may be served with a rule to do that which follows next after what he did last, and if he fail, then his suit in error may be non-prossed.

(88) The allowance of a writ of error in the general course of practice, is not served till final judgment is actually signed, to which the words of the rule apply. The rule requires bail to be put in, within four days after the allowance; but there is no opportunity of doing this till judgment be signed in the court below, See *Jaques v. Hixon*, *Term Rep.* 1.

See Defendant, Chapter I.

CHAPTER II.

1. Joinder.

AS to the joinder to the assignment of errors, (26) it is similar to the joinder in demurrer, therefore needs no example in detail, and concerning which no mistake can arise, as being drawn by the clerk of the errors, to whom it is only necessary to give notice.

This brings us over to the *fourth term*; when the clerk of the errors moves for a *consilium*, sets down the cause for argument, and moves for judgment against plaintiff in error.

2. Of the Taxation of Costs.

Judgment being obtained, the next thing is the taxation of the costs in error, this is also done by the clerk of the errors, and four days after judgment execution may issue.

(26) But special, commonly called real errors, are much more serious, they must be drawn and signed by counsel, and then filed with the clerk of the errors, and,

1. Notice of Argument

Must be given ten days before, to the clerk of the errors in the Exchequer Chamber, that the error assigned is to be argued (before the judges of the *Common Pleas*, and barons of the *Exchequer*).

2. Copies of Proceedings.

Eight copies of the proceedings must then be delivered to the judges, *i. e.* four by the plaintiff to the judges of the *C. P.* and the other four by defendant to the barons of *Exchequer*, and these must all be delivered four days before the hearing of the cause.

3. Of

CHAPTER II.

THE plaintiff's attorney being served with a copy of the rule to alledge diminution must then call on the clerk of the errors, and pay the sum thereby demanded, after which he is at liberty to assign errors.

1. *Assignment of General Errors.*

Afterwards to wit, on next, after
comes the said *plaintiff in error* by his attorney, and says, That in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that the declaration aforesaid, and the matters therein contained, *are not sufficient in law* for the said defendant in error, *to have or maintain his aforesaid action* thereof, against the said plaintiff in error. There is also error in this, to wit, that by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid, was given for the said defendant in error, against the said plaintiff in error. Whereas by the law of the land, the said judgment ought to have been given for the said plaintiff in error, against the said defendant in error. And the said plaintiff prays, that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things, which he hath lost by occasion of the said judgment, &c.

See Defendant, Chapter II.

3. *Of filing the Transcript.*

But before execution is returnable, the defendant in error should apply to the clerk of the errors in the court above for the transcript, that he may file it with the clerk of the errors in the court below.

Note. The principal difference between error from the *K. B.* to the *Exchequer* chamber, and that from *C. P.* to *K. B.* is, that in the latter, instead of the rules to alledge diminution and assign errors, a *scire facias quare executionem non issues*, which if returned, '*nihil*,' you then sue out an *alias*; and on '*nihil*' being returned to this, it amounts to same as *sci. feci* to the first. Therefore you may then give a rule for judgment with the clerk of the rules.

Conclusive Observations.

WHEN general error is assigned, the costs of the plaintiff in the original action are generally from about 15*l.* to 20*l.* Suppose we take the former and add that sum to the 45*l.* 14*s.* 4*d.* being the amount of the debt and costs in the original action wherein judgment went by default, the whole sum would then be 60*l.* 14*s.* 4*d.* after the parties had been a year and a half at law; for it is a rare matter that a judgment by default is obtained the first term, so that reckoning two terms in the court below, and four in the court above, they make just the above time.

But put the case of an issue being tried in the original action, and that being a year before a verdict therein was obtained, which is no uncommon but a very common case, and then a writ of error is brought afterwards. By this sort of conduct, the creditor is two years kept out of his money, and at the end of the time is out of pocket 30*l.* (89) in the original action, and 20*l.* in the suit in error, or perhaps 30 or 40*l.* more if the proceedings be special. A man therefore may risk 60, 70 or 80*l.* to recover a debt which perhaps originally was not greater than forty shillings, for when you once get into law, you are obliged to go on, by your adversary's compelling you by rules to proceed, which if you neglect, your action may be non-prossed, and you must pay *costs* to your debtor for having attempted to sue him.

So that the use which *can* be made of a writ of error is, that a rich man may harrafs his poor ad-

(89) The longer the cause is in *feri*, the heavier the costs.

110 CONCLUSIVE OBSERVATIONS.

versary till he has actually not a shilling left, and is consequently obliged to drop his claim.

The man therefore who can have the audacity to assert that the system is right, by which a creditor risks 30, 40, 50, 60 or 70*l.* to recover forty shillings, must either be an abandoned miscreant, who conceives laws were made to protect swindlers, and not to enable the honest creditor to recover his own; or he must be fit for *St. Luke's*, and consequently can have no capacity to qualify his judgment on the subject. For most undoubtedly, if any thing contract or injure the credit of this commercial country, or if any cause fill our jails with unfortunate and unhappy debtors, *it is that, of the heavy expense attendant on the administration of justice;* for by it, both parties are rendered desperate, mildness and humanity are banished from their hearts, and thus they proceed from one thing to another, and from that other to a third, till lastly constrained to end, they finish in their mutual perdition; two *fathers* perhaps perishing in a jail, and two *families* reduced from comfort and happiness, to indigence and want.

Thus ends our common action against the principal. We have only to demonstrate the proceedings against the unhappy bail, in case their principal abscond, which we shall make the subject of the next book, treating it however as concisely as possible.

B O O K V.

CHAPTER I.

PROCEEDINGS against BAIL *above*. (90)

Preliminary Observations.

THERE are two ways of proceeding against bail *above*, the one by an action on the recognisance, in which case the following *ac etiam* is necessary to the process, *viz.*

“ And also to a bill of the said plaintiff, against the said defendants, in a plea of debt upon recognisance, according to the custom of our court, before us to be exhibited.” (91)

The *other* mode is by “*scire facias*,” which is by far the more usual, and it is particularly so rendered; as proceed which way you will, you *cannot bold the bail to bail*, because they have eight days *in term* to surrender their principal, “after the return of process against them;” consequently it would be unjust to arrest them, for till those eight days be expired, they are by no means chargeable with the debt; for if in the course of that time they surrender the principal, (92) all proceedings against *them* are at an end.

(90) Bail *below* or to the sheriff are proceeded against, by taking an *assignment* of the bail bond, which therefore not differing from another action in debt upon bond, it needs no particular example; however, the defendants have the liberty either of pleading, or giving in evidence as the case may require any thing that ought to exonerate them from the penalty thereof.

(91) For otherwise, neither the defendants or their attorney need accept the declaration. R. C. 15 G. II.

(92) But of this the plaintiff's attorney should have notice.

Note.

112 PROCEEDINGS AGAINST BAIL.

Note. The venue must be always laid in *Middlesex*. *Salk.* 564. 600. 659.

But let us proceed by giving an example in *scire facias*, supposing that in our action to recover the amount of the gold repeater, &c. judgment had gone by default, and execution had been in the first place delayed by writ of error; but that afterwards the judgment of the court below being affirmed in the court above, the defendant in the original action disappeared, and thereupon the principal being off, the plaintiff (93) was desirous of fixing the bail.

(93) In the original action.

Note. See RULING the SHERIFF in the Alphabetical Chapter.

EXAMPLE of a SCIRE FACIAS.

ON the part of the defendant, nothing need be observed but what may easily be collected from the plaintiff's pages, except as to

What Defendants in Sci. Fa. may plead.

This may be, that the principal *died* before the *ca. fa.* was returnable. *Roll Abr. 336.*

Or, That the plaintiff actually had another execution against him.

Or, That the principal had paid the money recovered. *5 Ann. c. 16. s. 12.*

Or, That they had surrendered the principal, and in short a variety of other matters; for any thing that would exonerate the *person* of the principal will *wholly* exonerate the bail, not only as to their persons, but as to their *property also.*

3. *Form of the Sci. Fa.*

George, &c. To the sheriff of *Middlesex* greeting,
 Whereas the plaintiff lately in our court before us
 at *Westminster*, by bill without our writ, and by the
 judgment of the same court recovered against the
principal 45l. 14s. 4d. (95) for his damages which
 he sustained as well by reason of the not performing
 certain promises and undertakings, made by the
 said *principal* to the said *plaintiff* as for his costs and
 charges, by him about his suit, in that behalf ex-
 pended, whereof the said *principal* is convicted, as
 appears to us of record; and although judgment
 thereof is thereupon given, yet *execution* of the da-
 mages aforesaid, still remains to be made to him
 the said *plaintiff*. And whereas the defendants of,
 &c. lately (that is to say) in term, in the
 year of our reign, in our said court, before
 us at *Westminster*, came personally in their own pro-
 per persons, and became pledges and bail, and each
 of them became pledge and bail for the said *prin-
 cipal*, that if it should happen the said *principal*
 should be convicted at the suit of the said *plaintiff* in
 the plea aforesaid, then the said defendants consent-
 ed, and each of them consented that all such da-
 mages (96) as should be adjudged to the said *plain-
 tiff*, should be made of their and each of their

The roll is then taken to the clerk of the judgments to enter
 the recognisance and mark the roll, which should then be taken
 to the treasury and filed.

(95) The amount of the debt and costs in the original action;
 for to the costs of the suit in *error*, the bail in the original action
 are not liable.

(96) When the original action is in debt, the debt and costs
 are kept distinct, and the latter are called damages sustained by
 the detention of the debt, and the costs thereby expended.

lands

lands and chattels, and levied to the use of the said plaintiff, if it should happen that the said *principal* should not pay the same damages, or render himself to the marshal of our prison of the *Marshalsea* before us, on that occasion, as by the record of the said recognisance now remaining in our said court, before us at *Westminster* fully appears. Yet the said *principal* hath not yet paid the said damages, nor any part thereof to the said plaintiff, nor rendered himself to the marshal of our prison of the *Marshalsea*, before us on that occasion, as we have received information from the said *plaintiff*. Wherefore the said *plaintiff* hath humbly besought us to provide him a proper remedy in this particular, and we being willing that what is right and just should be done, command you, that by honest and lawful men of your bailiwick, you make known to the said defendants, that they be before us at *Westminster*, on

next, after

to shew if

they have or know, or either of them hath, or *knoweth* of any thing to say for themselves or himself, why the said *plaintiff* ought not to have his *aforsaid* execution against the said defendants for the damages *aforsaid*, according to the force, form and effect of the said recognisance, if it shall seem expedient for him so to do. And further to do and receive all and singular those things, which our said court before us, shall then and there consider of them in this behalf. And have there then the names of those by whom you shall so cause it to be made known to them, and this writ. Witness *Lloyd Lord Kenyon*, at *Westminster*, the day of in the year of our reign.

Stormont and Way.

The *sci. fa.* being engrossed as above, on a half crown stamped parchment, is then both signed and sealed,

sealed, and a *præcipe* thereof left in the office, the same as in the suing out other writs.

4. *Return.*

The writ is then left at the sheriff's office for a return of "*nihil*," if you mean not to summon the bail, (97) and upon the return thereof "*an alias*" is sued out; but the *teste* of this second writ, must not be earlier than the *return* of the first. You leave it in like manner *four days* before the return day, at the sheriff's office, and being returned, "*nihil*" like the former you give a rule to judgment, as in other cases.

Note. These two *nibils* are equal to a *scire feci* returned by the sheriff upon the first writ. (98)

If the Bail appear.

When the bail appear either to the first or second writ, plaintiff then delivers or files his decla-

(97) But if the plaintiff wish the bail to be summoned, then the sheriff by one of his officers delivers them a summons to appear, in like manner as in proceedings in the *Common Pleas* by "*Quare clausum fregit*."

(98) Is it not a little curious, that giving the bail *notice* upon *neither* writ, should be equal to summoning them upon the first writ? for by the two *nibils* being returned, it is evident that an action by *sci. fa.* may be commenced against them, and go to judgment without their knowing any thing of the matter; it is therefore always right for bail to search the sheriff's office, to see if any *sci. fa.* have been there left for a return; or they may be actually fixed and know nothing of the matter, though they might have even the *death* of the party before the return of the *ca. fa.* to assign as excuse, which is at all times an exoneration of them, upon the ground that a corpse cannot be surrendered in a court of justice.

"To what is this custom analogous, in morals or in mathematics, or where is the chemist who ever discovered that out of "*two nothings*, a *something* could be composed."

ration

ration (99) as in other cases, and the rest of the proceedings are as in common cases, therefore there needs no further example.

(99) The declaration is little more than a repetition of the writ.

See Defendant, p. 115.

RECEIVED OCT 18 1890

is in order of the day
the first of the month
the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

The first of the month
will be the first of the month

PART II.

BEING THE

E L E M E N T S

OF

SPECIAL PLEADING.

BOOK I. Of the several Genera of Actions, their several Species, their *Declarations* and general *Issues*.

II. OF SPECIAL PLEAS.

III. OF REPLEVIN.

IV. OF EJECTMENT.

V. ALPHABETICAL CHAPTER,

containing those Things which would have deranged the Order of the Work, had they been placed elsewhere.

B O O K I.

CHAPTER I.

The ELEMENTS of SPECIAL PLEADING.

THE pleadings are the mutual altercations of the parties in writing; they are the literal correspondence between the plaintiff and defendant, under the correction and inspection of the court to whom they are in the nature of remonstrances addressed. But as we have already given examples of two declarations at full length, we shall here only principally treat of the *primary* count, nevertheless mentioning what is necessary respecting the others; it is *not* the form, but the *matter*; it is not the compound, but the elements of which the body is composed that we now mean to demonstrate. For, in reality, notwithstanding the many great volumes of printed precedents of pleadings, not only to the public at large, but even to *nine tenths* of the profession, is this branch of the law either totally obscure, or but very badly known, and this wholly owing to the want of a good analysis. For certain it is, that those who have hitherto written on the subject had not abilities to give *one*, or it was a matter they did not wish to explain.

The attorneys then do *not* draw their own pleadings, except in the most common cases; but they are drawn by "draughtsmen called special pleaders," of which some are at the bar, and others below it; and no sooner does a cause get into their hands, than by their technical and absurd forms, it becomes *completely confused*. Let us however unveil the mystery, and shew the monster in its proper light.

CHAPTER II.

Of the several kinds of civil Actions, their Declarations and general Issues.

WE shall divide actions first into two classes, *i. e.* personal and real; the latter, *in the manner we shall treat of them*, are called mixed, as partaking of the nature of *both*, real actions being now almost wholly disused, to which the mixed have succeeded; but why I have chosen to call them real, is because the property disputed by them consists always of something immoveable, as houses or lands, in opposition to money, or other such effects which may be made to follow the owner's person, and therefore called *personal*.

The first class then, or *personal* actions, are the legal remedies for injuries done to the person of the plaintiff, or his personal property; this class consists of two orders.

1st. Those which relate to injuries committed *without* force. (1)

And 2d. Those which relate to injuries committed *with* force. (2)

Of the first Order are several Genera, the first GENUS being that of ASSUMPSIT, having eight Species, viz.

1st. *Assumpsit* for work and labour, being for "a manufacturing tradesman's bill."

2d. ——— for goods sold and delivered, being for the bill of a merchant tradesman, or shop-keeper.

(1) These are known by the name of trespass on the "case."

(2) And these by that of trespass, "*vi et armis*,"

3d. *Assumpsit*

124 GENERA of Actions and their SPECIES.

- 3d. *Assumpsit* on promissory notes and bills of exchange,
- 4th. ——— for money laid out by the plaintiff for the defendant's business,
- 5th. ——— for ditto had and received by the defendant for the use of the plaintiff,
- 6th. ——— for money lent.
- 7th. ——— on an account stated.
- 8th. ——— for use and occupation, which is to recover rent for premises *not* let upon a lease,

The second GENUS is that respecting GOODS LOST, having two Species.

1st. *Trover*. This is brought for the recovery of goods, the property of the plaintiff, of which the defendant became possessed by some accident, yet refused to deliver them up *when demanded*. The suggestion is therefore that *he* found them.

In this action however, the goods themselves cannot be recovered, but only *their value*.

2d. *Detinue*. Which proceeds on the same ground as the former, but herein the "*goods themselves*" are recovered.

The third GENUS is that of Defamation, having two Species.

1st. That for words "*actionable in themselves*."

2d. For words *not* actionable in themselves, but from the speaking of which the plaintiff has nevertheless suffered some damage, "*by consequence*."

The fourth GENUS is that of the *special* action on the CASE, having species *innumerable*, as it is a kind of general remedy used in cases wherein *no other* remedy is provided.

CHAPTER III.

1. *Of the First Count in a Declaration for Work and Labour.**These are its Parts.*

1st. **T**HE day on which the transaction between the parties took place, (which may be any day before the writ sued out.)

2d. The place *where* the transaction arose or was concluded, which must be some place in the county, wherein the venue is laid; if in *Middlesex*, it is usually stated that the transaction took place in *Westminster*: but if the venue be laid in *London*, then in the parish of *Saint Mary-le-bow*, in the ward of *Cheap*.

Note. These two parts being common to every primary count, we shall therefore not mention them any more.

3d. The amount of the debt, which may be any sum you please, but not less than you mean to recover.

4th. For work and labour done by the plaintiff.

5th. At the defendant's request.

6th. The defendant's *assumpsit* or promise to pay.

Note. All these are deemed essentials, and if any one of them be omitted, the declaration may be demurred to.

2. *The other Counts.*

These have the same elements with the primary count, except that each "*quantum meruit*" has, after promise to pay, the addition of an **AVERMENT**, That the work or goods were worth so much money.

Note.

Note. So that as the satellites are governed by nearly the same rules as their primary planet, the reader may perhaps be curious to know how it is that this *planet of assumpsit* happens to have so many attendants; in such case, I can only give him this physical reason, "that the planet being at so great a distance from the sun, necessarily requires considerable additional light;" for what person could possibly discover, did he rack his brains for seven years, that the declaration which we gave in our first example, in the first part of this work, was to recover 30*l.* 5*s.* for a gold repeater, and engraving the letter F. on the outside case of it, unless he had had some previous information.

It may be asked then, if the defendant should be willing to pay the debt without going to trial, how can he know the amount of it? Why he must get *particulars of the plaintiff's demand*; (3) and yet judge *Blackstone* says, *the declaration sets out the cause of action at full length*; but we shall only say it ought so to do.

3. *Of Goods sold and delivered.*

The declaration is the same as for work and labour, except as to the two first counts which are *not* necessary.

4. *Of Promissory Notes, &c.*

The first count has the same component parts, as in work and labour, &c. differing only as to the cause of action; for a note or bill must be recited with accuracy, and the date and sum must be exact.

You then add,

"By reason whereof, and by force of the statute
"in such case made and provided, the *defendant*
"became liable to pay according to the tenor and

(3) Then why not give in these particulars at first, since proceedings may be afterwards staid, till it be given in.

"effect

“effect of the note, and being so liable, &c. (here follows the *assumpsit*) for although in this action you declare upon an express promise, still the implied one must be inserted.”

The 2d. count is for money lent.

3d. For money laid out and expended.

4th. For money had and received.

5th. On an account stated. (4)

And every count after the first (not only in this, but in all actions of *assumpsit*) must state the defendant to be indebted in *another* sum; for if the word *another* or *other* be left out, those counts may be demurred to.

5. As to the 4th. 5th. 6th. and 7th. species of *assumpsit*, there is nothing more needs be remarked, than that all those counts have the same component parts, differing only as to the cause of action.

6. *Use and occupation.*

The first count states the defendant to be indebted to the plaintiff in a certain sum for the use and occupation for a certain *time* of certain premises, situate in a certain place. To this is added the auxiliary, *i. e. quantum meruit*, a third count for money laid out, a fourth for ditto had and received, a fifth for an account stated. And there must be *promises* to pay to every one of them, and lastly the common conclusion.

In short, so many different counts are so many different transpositions of the cause of action; it is the same tune set to music, in so many different keys, to adapt it to as many different instruments.

and the song is not alone *encored*, but *encored again* and *again*, as has been already remarked, by the pleadings being twice engrossed on parchment, and twice copied on paper; consequently, the number of times the cause of action is repeated, by means of these various transpositions may at all times be known, by *multiplying* the number of counts in the declaration by *four*.

7. *The leading Feature of an Action of Assumpsit.*

The reader must now clearly understand the leading feature of this kind of action, is "the *assumpsit* or *promise to pay*;" which must be inserted in every one of the counts.

Thus much then for the declaration, we shall now proceed to the plea.

8. *GENERAL ISSUE in Assumpsit.*

Every declaration contains some certain question put by the plaintiff to the defendant, consequently it naturally requires of the defendant some certain answer, and this is called the Plea.

1. The question therefore in a declaration for *work and labour* is, "Did I, or did I not do certain work for you."

2. In *goods sold and delivered* it is, "Did I, or did I not sell and deliver you certain goods."

3. Upon a *promissory note* it is, "Did you, or did you not give me such a note."

4. In *money laid out and expended*, "Did I, or did I not lay out so much money about your business."

5. For *money had and received*, "Did you, or did you not receive so much of my money."

6. For *money lent*, "Did I, or did I not lend you so much money."

7. Upon

5. Upon an *account stated*, "Do you, or do you not owe me such a sum upon a certain account settled between us." And, in use and occupation, "Do you, or do you not owe me so much rent for the use of certain premises, for a certain time."

Now to a plain question, one ought certainly to make a plain answer, and that which is the most natural is always the best.

All answers must therefore be in the affirmative, or in the negative; the general issue is of this latter kind. The natural denial, consequently, to the charge contained in the first question every one knows should be.

"You have done no work for me."

To that in the second question.

"You never sold me any goods, or you delivered no goods to me."

To the third.

"I never gave you any such note."

To the fourth.

"You have laid out no money for me."

To the fifth.

"I have received no money of your's."

To the sixth.

"You never lent me any money, or I never borrowed a farthing of you."

To the seventh.

"We have settled no account together, for we have no account between us."

And to the eighth.

"I have occupied no premises belonging to you."

But all these are natural, (5) not *legal* answers. For suppose you were defendant, you must not say in

(5) Though there can be little danger of these natural or rational answers being put in for defendants, as long as they appear by attorneys and not by themselves, for the attorneys will be

in your plea, "that the plaintiff did no work for you."

No, *that will not do*, but you must say, "that you never promised to pay him for it."

You must *not say*,

"You have had none of his goods, or that he never sold you any goods."

But, "that you never promised to pay him for them."

You must *not say*,

"You gave him no such note."

But, "that you never promised to pay it him."

You must *not say*,

"You have received none of his money."

But, "that you never promised to pay him the sums he charges you in his declaration."

You must *not say*,

"That he never lent you any money."

But, "that you never promised to pay him the sums he alluded to."

You must *not say*,

"That you have settled no account with him, because that you have none running with him."

But, "that you never promised to pay him *the balance*."

For the general issue in assumpsit, "*is non-assumpsit*," that the defendant *did not undertake* and promise to pay, as (6) set forth in the declaration.

It may be however asked, where is the attorney so uninformed, as not to know the *general issue*, to a declaration *in assumpsit*? I can only answer, that I

be always sure to put in some plea, in legal form, although it may happen to be a wrong one.

(6) See the form of it, *ante* p. 21. it runs that the defendant did not undertake and promise in manner and form as the plaintiff hath complained against him; and this complaint in the declaration is, "that the defendant undertook and faithfully *promised to pay*" the plaintiff, &c.

hope

hope there are very few such; yet that some such *have* been, and some such no doubt yet *remain*, or so excellent a reporter as Mr. *Morgan* would never have taken notice in his *Vade Mecum*, (7) "That if the defendant in assumpsit, plead not guilty, it is bad upon demurrer."

Thus much for the General Issue in Assumpsit.

CHAPTER IV.

I. Of TROVER.

THE declaration in an action of *trover* seldom consists of more than one count, which must have these essentials.

1st. That the plaintiff was possessed of the goods.

2d. Their value.

3d. That he lost them.

4th. That defendant found them.

5th. And knowing them to be the plaintiff's property, yet defendant has not delivered them, although often requested.

6th. But has converted them to his own use.

7th. To the plaintiff's damage of so much. (8)

2. Of Detinue.

The count in *detinue*, differs from that in *trover*, in this only; that the conclusion instead of stating the defendant to have converted the goods to his own use, "states that he still detains them."

(7) Vol. I. p. 136.

(8) The 5th. 6th. and 7th. parts compose the conclusion, though as to the last it is common to every conclusion, we shall therefore not mention it any more.

3. *Of the General Issues to Trover and Detinue.*

The leading feature in trover, is the *finding* the goods; and in detinue, the *detaining* them.

Now is it not a little singular, that although to the latter the defendant is at liberty to plead "that he does not detain the goods;" yet to the former he cannot plead "that he never found them:" notwithstanding even such plea is the actual *truth*, but it is *no plea in law*; the general issue in trover being, "that the defendant is *not guilty* of the premises."

Note. Before either trover or detinue is brought, the things in dispute must be demanded in writing.

CHAPTER V.

Of DEFAMATION.

1. *Declaration, (9)*

IN actions for slander much nicety is required; the special pleaders are therefore vastly curious in the well management of their declarations, *ringing* various changes on the words, thereby making as many *counts* as their ingenuity can invent: I recollect once being in the court of *Common Pleas*, when a learned serjeant moved that a declaration of this sort might be referred to the prothonotary to strike out those which were superfluous; for it contained no less than nineteen.

I have often been angry with myself, that I did not take a note of this cause; but I suppose, at the

(9) Which may be either words spoken, written, or printed, the two last being what are termed "Libel."

time,

time, I thought it involved in it nothing material or very extraordinary.

The following Parts, however, in the Primary Count in Defamation, are always necessary.

1st. It must state that the plaintiff was of good character.

2d. The words, (10) or their substance (11).

3d. And they must be stated to have been spoken in the presence of witnesses.

4th. And of the plaintiff in particular.

5th. They should be explained by an innuendo (12).

6th. That the defendant spoke the words with a malicious intent.

7th. And if the damage be special, it should be stated how it arose (13).

2. General

(10) But if the words be stated, they must be the very same as were spoken; for if it be alledged that the defendant spoke such words or similar ones, the count will be bad for its uncertainty. See *Morg. Vade Mec.* Vol. I. 239.

(11) But when the substance *only* of the words is stated, then the declaration changes its form from the common mode of declaring, in omitting to state the *speaking and publishing*; alledging instead that the defendant falsely and maliciously in the presence and hearing of, &c. charged the plaintiff with, or imposed upon him, a certain crime, as murder, robbery, theft, &c.

(12) This is when the *very* words are declared on; and as well when the plaintiff is spoken of by a character that is *not* by his name, it is necessary to aver that the plaintiff was the person whom the defendant meant to represent.

(13) For instance, if I impute felony to a man, the scandal is so great, it is supposed that damage must follow of course; he has therefore only to state the words or their substance in his declaration, and prove them on the trial.

But if I call a clergyman a bastard, it is quite different; for a bastard may make as good a clergyman as one born in wedlock; yet if he happen to lose a living (1) by the story, he has then a very

(1) See *Blackstone's Com.* Vol. III. p. 124.

2. *General Issue.*

The general issue in defamation is "Not Guilty."

3. *Libel.*

Before I quit the subject of defamation, I beg leave to observe that several of my friends have urged me to give my sentiments much at large on the subject of *Libel*, that is to say, as to the constitutional legality of the attorney-general's filing informations *ex officio*. As to that, therefore, I beg leave to observe, that I do not believe, in any one case whatever, that such power was ever made use of for the public good, without attributing any bad motive to the public officer. In its effects, so great a power lodged in the hands of any one individual, be that person who he may, let his private character be ever so good, or his public abilities ever so great, must not alone be dangerous, but absolutely pernicious. Judge *Blackstone*, in treating of the court of *King's Bench*, has indirectly thrown the greatest sarcasm on this part of our laws that even man did. He tells you that in this court has resulted all that was good and salutary in the court of *Star Chamber*. I have only this question to ask, *What* ever was good and salutary in that court? And can there be any room to doubt that the oppressions following from its decrees were among the first causes that contributed to the ruin of *Charles the First*? Can there be a doubt but that they alienated from the breasts of the people their love for their sovereign? Is it then an unfair inference to draw, that the same, or a similar cause, which lost King *Charles* his monarchy and his head

just action against me for damages arising to him *in consequence*. But then he must set forth in what particular manner they happened to turn out so much to his prejudice,

into

into the bargain, may lose us our valuable constitution? For informations *ex officio* are the *Star Chamber of the present day*; though, as I before observed, I do not at all mean to prejudice the character of any person who may fill the office of filer of them; as it is the office itself not the individual who is the officer, that I object to. Having then called the mode of filing informations *ex officio* unconstitutional, I ought no doubt to point out what is the constitutional method of proceeding in such cases. This then shortly is, *that a bill be presented to a grand jury*; for by those laws which regulate the liberties of *Englishmen*, no man in a criminal case ought to be condemned but by the judgment of twenty-four of his peers, at least twelve of the grand jury, and the whole of the petit jury. The first are to find whether there be good cause of accusation; the second, whether there be such proof as ought to go to conviction. And certainly the first is not less necessary than the second; for though it is very true that accusation is not guilt, and God forbid it should be; yet when a man has been once arraigned at the Old Bailey, *it does not give one a higher opinion of his character than one had before*, although it be added that he was acquitted. There is something in the prejudice of mankind that naturally attributes such acquittal rather to the prisoner's good luck on the occasion, than to his total innocence of the fact. It was no doubt for this excellent reason that grand juries were originally established, namely, in order that as few people as possible should suffer by the prejudices of mankind. And for my part I see no reason why the attorney-general should not present *his* bill before a grand jury, as well as a private individual. There would be no sort of danger, were his cause a just one, but the same attention would be paid by a grand jury to a complaint coming from *him*, as from any other person. Indeed that cause must be a very bad one,

one, that the prosecutor is either *ashamed or afraid* to trust a jury with the decision of, and to be sure, after all, that doctrine whereby the petit jury shall only find the facts of printing and publishing, with the application of the innuendós, without considering the libellous matter, which is to be left in the breast of the judges, is *contemptible in the highest degree*. Nor do I at all approve of reading affidavits in aggravation of a man's guilt at the time he receives judgment; for as to his subsequent conduct, if that have been bad, it is the subject of another prosecution; it is a distinct offence, which should be enquired of by *another* jury: for taking a man's further conduct into consideration, is unquestionably condemning him in that respect, for what has not even been tried by a *petit* jury, let alone the grand jury, who ought first to find if there be cause of accusation! Was it ever heard of at the *Old Bailey*, that when a criminal received sentence for a highway robbery, that affidavits were read to prove him since guilty of murder, and that therefore it should be urged, in aggravation of his guilt, that he ought to be hanged in forty-eight hours, and then dissected? All the world would laugh at the ignorance of the prosecutor who made the attempt, and at the stupidity of the counsel who supported the motion. Indeed, so far as regards *Libel* in particular, which has already been defined a man's being abused *either in writing or in print*, I question much if it ought to be the subject of a criminal prosecution at all; for if any man have received any damage, or be likely to receive any, as the case may be, why not refer him to his civil action? The law in that respect seems perfectly competent to make the injured party every reparation; and I am sure, in every case that I have seen, juries have always been very ready to give ample damages in cases of defamation, whereby the reason of the thing seemed so to direct. I know very well

well those who take the other side of the question will urge, what are you to do with a *blackguard*, who is perhaps not worth a shilling? How are you to recover any damages of him who has not a farthing to pay? You will not even get your costs of him? To be sure, this appears, at first, very good reasoning, but it is a *sophistry that ought to be refused*. Suppose you prosecute criminally, what damages do you get then? The fine goes to the king. And what costs do you get? None at all; for costs are never given to plaintiffs in criminal cases. Consequently, if one man prosecute another criminally, the prosecutor is sure to be the costs out of pocket. But then it will be urged the court will inflict the punishment of imprisonment upon him; but so you yourself may, for you may take him in execution for the damages and costs, and keep him in jail till he pay you. But then he may pay and get free, say you: why then you receive every *compensa* that a jury of your countrymen thought proper to give you; and surely every good citizen with that ought to be contented. There can be no reason whatever, after that, to wish your adversary to be imprisoned; such a temper must be quite repugnant to the mild and benevolent dictates of Christianity, "to forgive your enemies, persecutors, and slanderers." You may ask, perhaps, can the Crown bring an action for damages? Most undoubtedly so; for it is daily done in the Court of Exchequer for the recovery of penalties. Therefore, if the crown can bring an action in one case, where is its incompatibility to bring one in another? And if this be not plain enough, an act of parliament can soon make it so. What have we a parliament for, but to alter the laws where they are wrong, to explain them when doubtful, and to preserve them where right? And if this be not done, the end of a parliament is no longer answered; the design for which it was chosen is subverted; and in such

such case is made good, that known apothegm of the great Sir *Edward Coke*, * That *oppression under colour of law*, and in the shape of justice, is the *worst of tyranny*.' Besides, suppose the attorney-general to prosecute an innocent man, I mean innocent of the fact laid to his charge, whether such fact ought to be considered as a crime or not. (14) I have somewhere read in the works of an excellent philosopher, " That in cases of libel, many people were
 " often found guilty by juries, merely upon the
 " ground that the case was made a serious one, and
 " as such they considered it as a crime; whereas, had
 " the case been differently explained to them, or the
 " unhappy man had been tried by a jury of philo-
 " sophers, so far from receiving the punishment in-
 " flicted on him, in consequence of their verdict of
 " guilty, he would have received *their thanks* and
 " the gratitude of his country, for having published
 " a work so highly meritorious, tending so much to
 " serve the liberties of his fellow-creatures, and con-
 " sequently to promote the blessings of domestic
 " life, perpetual fountain of all social sweets."

" Objects the same, in different lights appear,
 " And but the colours which we give them wear.

POPE."

However, as colours were designed no doubt to delight the eye, we shew our particular taste by a proper selection of shades; like music which was intended to amuse the ear, those sounds that are

(14) And suppose a man prosecuted by the attorney-general be acquitted, where are his costs? Why he has none allowed him, because it is beneath the King's dignity to give any. Surely I should think the King, or in other words the public, much better able to bear the loss than the individual. Before people give reasons, they should consider whether they be good ones or not; the same as in flattery, before they attend to compliments, they should consider whether they deserve them.

most

most harmonious, are of course the most universally pleasing; and as every one more or less, must needs be acquainted with the blessings of liberty, so must the sweet notes of freedom pass from ear to ear, from mind to mind, from soul to soul, and whose master key can be the dictates only of every honest heart. True and genuine freedom can only be supported by possessing the liberty of speaking, writing, printing or publishing in the most free, open, and unequivocal manner those thoughts and ideas, which the all bountiful Creator of all, has imparted to his humble creature; whose duty it is to contemplate the works of his Maker, and make these the guide of his actions.

That cause is a very bad one indeed, which will not bear the *other side* of the question to be heard. For wherever there appears a wilful and malicious intention in one man to injure the character of another, or even by an act of folly that his neighbour is hurt in consequence; according to the nature of the case, as I just now took notice, 'a jury will always give such damages as reason directs.' And if ever it happen that a jury acts otherwise than right, it is really not the fault of the persons whose names compose the panel; but the technical and absurd manner in which every practical proceeding is drawn; so that if you read a record, the circumstances having been before stated to you, instead of having the matter elucidated as you would naturally expect, in order that it might be the better understood from the complaint and defence being both committed to writing; by *Heavens*, instead of finding things explained, or the facts simply stated as you might expect, you find them enveloped, intricate, puzzled, technical, perplexed and confused. The *practice* of the law should therefore be rendered plain and easy, it should be in the emphatic language of the scripture, so plain, 'that every man who
runs

runs may read: 'Render it so, and you will have no occasion for an Attorney General to file *ex officio* information; nor will there be any need of the other method of procuring one, namely, that 'of moving the court for a rule to shew cause why *one* should not issue.' A grand jury would be as good a judge of the matter of accusation, as the judges of the bench, who in my eyes never appear in so *amiable* a light, as when they are determining controversies by the *assistance of a jury*. The separation therefore of the province of the judge from that of the jury, is in my mind like the separation of soul from body. It is in short the suspension of *constitutional* respiration, and this can only be caused by a collapse of the lungs of the press, through which we breathe the vital air of freedom, *the right of printing and publishing our thoughts in any manner, or in any form we like best, so we do not prejudice the reputation of individuals*. And if we do, the private action is always open, (15) for the public at large can receive no injury whatever from the freedom of the press; but every benefit and advantage, as it is from the discussion of every subject, 'truth must arise,' while policy, secrecy and craft, doomed to work only under ground, are denied by the God of nature, the blessings of the light of the sun. But this was *never intended to be the situation of the press in a free country*. Therefore I pronounce the whole business of information altogether unconstitutional, improper and unjust, derogatory to the rights of a free people.

Note. I have now obliged my friends, with giving my public opinion upon this subject, which to the public I flatter myself will not be unacceptable, and whom I hope will do me the justice to believe, that nothing should have induced me to have at all touched upon it, but that I think the whole business of libel,

(15) And this will always be sufficient to correct the licence of the press, for under the *mask* of correcting the licence at present, the liberty is destroyed.

perfectly

perfectly an offence of civil and not of criminal cognisance; or at the utmost, if the Attorney General should have the power of proceeding criminally, 'That he present his bill like another man, who has a prosecution to commence at the suit of the King to a grand jury.' For the King is plaintiff in all criminal proceedings, though at the instance of a private prosecutor, who so prefers his bill. Why then I want to know, should not accusations be presented the same way, where the King is plaintiff upon the information of his public officer?

CHAPTER VI,

Of the Special Action on the Case.

IT having been already observed that this genus of action, is a kind of general remedy for injuries, in cases wherein the law has prescribed no other; the number of its species are of course indefinite, we shall nevertheless treat of *those which most commonly occur* in the ordinary course of things, giving some one particular example in each, from which the reader may very readily collect the manner in which any other declaration of the like, or a similar species ought to be composed.

1. *First then of the action of Deceit. (16)*

It is hardly necessary to state that this action lies, where the defendant has taken any undue advantage of the plaintiff, as by misrepresenting a thing, &c.

But, perhaps no action varies so much in its nature as this; however, the best rules to be guided by, are,

(16) It is local, the venue must therefore be laid in the county where the transaction happened.

1st.

1st. Was the defect visible or latent, in other words, did the plaintiff when he went to market make use of his eye-sight, or not.

2d. Did the defendant make such warranty as he had no authority to do, thereby exceeding the limits of truth to which a vendor is in all cases bound to conform.

3d. Or did he knowingly and wilfully assert either what he knew to be false, or did not know to be true.

Thus then this declaration must depend totally upon the circumstances of the case, therefore to shew how it can vary, the better way will be to give two different examples.

1st. That of a *declaration* upon an exchange of a cow and a calf, for a horse and five guineas.

The component parts of the first count should be,

1st. The bargain.

2d. The *scienter*, that the plaintiff knew the defect, for example, that the horse was sixteen years old, and broken-winded.

3d. Yet warranted him to be only seven years old, and *sound*.

4th. That the defendant notwithstanding actually exchanged, &c.

5th, An averment, that the horse was above nine years old, to wit, sixteen, and also unsound and broken-winded.

6th. And that he so continued (at the time the action was brought.)

7th. And so the defendant deceived the plaintiff.

A second count may be added for the age of the horse only, and a

Third, relative to his wind.

The General Issue is, "Not guilty of the premises."

Our

Our *second* example is, that of a declaration in *warranty* in case on promises, having these parts,

1st. In consideration that the plaintiff would buy of the defendant a certain gelding of the price of 42*l*.

2d. Thereupon the defendant undertook to warrant that the horse was found.

3d. Whereupon the plaintiff bought him at the price aforesaid.

4th. And then and there paid the said sum for him.

5th. But the defendant not regarding his promises, deceived the plaintiff, for the horse was not found at the time.

6th. But on the contrary was blind.

A second count may be added like the former, only stating that the plaintiff had bought a certain other gelding of the defendant.

A third, for money had and received.

A fourth for money laid out, and expended.

A fifth, for an account stated, with the common conclusion.

To this declaration the General Issue is, "non assumpsit." Not that the defendant never sold the plaintiff such a horse, or that the horse *was* found, but that the defendant never promised to pay for him.

2. *Of the Special action upon the Case, in the Nature of a Conspiracy.*

This differs from the action of conspiracy *itself*, in as much as that only can be brought against *two*; but *case* in the nature of it, may be brought against *one*; and in order to carry on the former, it is necessary that the plaintiff should have obtained directly after his trial, a copy of the record of his indictment

dictment and acquittal, (17) which the court may or may not grant, according to the opinion they have formed of the prosecutor's conduct.

But as to the latter action of which we are now about to treat, it may be founded even on an indictment that has been rejected by the grand jury; for it is not the danger to the plaintiff, but the scandal, vexation and expence, upon which this action is founded. (18)

The *essentials* of the count are. (19)

1st. A statement of the plaintiff's good character.
2d. That the defendant, in order to injure the plaintiff in the same, and cause him to be looked upon as a thief, &c.

3d. And to cause him to undergo the punishment annexed to such a crime by law. (19)

4th. And to put him to great charge and expence, and to vex and disturb him.

5th. On the day and year aforesaid, in some place in the county aforesaid, (usually the county town) maliciously and without any probable cause, imposed the crime of felony on him, by accusing him of theft, &c. (here the crime should be recited as in the indictment.)

6th. If the defendant were apprehended, and taken before a magistrate, *it should be stated*; or what other, if any, deprivation of liberty he suffered.

(17) See *Black. Com.* Vol. III. p. 126.

(18) *Ibid.* 127.

(19) This is also a local action.

(20) And hence the distinction with regard to words, which may be always known, if they be actionable in themselves, by considering were they true, if the plaintiff would be liable to suffer any punishment in consequence. For this reason we took notice *ante* of calling a clergyman a bastard, because if any damage arise, in such case it must be, "*per quod*," as no man is liable to punishment on account of his birth,

7th. An averment, that in truth he was not guilty of the crime so imposed on him.

8th. If the indictment were actually preferred, *it should be stated that it was so, maliciously.*

9th. The indictment should be then set forth, and before whom preferred.

10th. Whether or not the bill, were found, if so, what other proceedings were then had; as the declaration must shew the termination of the prosecution.

To this the General Issue is, "not guilty," and no doubt the best in point of substance which could be contrived, it being a ready answer by the defendant to every question put to him by the plaintiff.

3. *Of the Declaration for Negligence or Misbehaviour of an Officer, as for example, against the Sheriff for the Escape of a Prisoner. (21)*

The count must state,

1st. The process upon which the prisoner was taken, out of what court it issued, and its kind.

2d. For what sum.

3d. The delivery of the writ to the sheriff before the return thereof.

4th. The caption of the prisoner.

5th. His escape.

6th. What return the sheriff made to the writ.

(22)

7th. Whether true or false.

(21) An action of the like nature also lies against a sheriff for neglecting to *take* a defendant, when in fact he might have taken him.

(22) For it is always proper to rule the sheriff to return the writ, before any action is commenced against him.

Now, In an action against a sheriff for neglecting to take a defendant, it is usual to add one count for negligence in not taking him when he might; and another for after *having* taken him, letting him go again; though surely one should think, one count would at all times be sufficient, and that upon the facts returned, for what matters it, whether he took him or not, so he has not his body ready at the return of the writ, if upon the trial it can be fairly proved that he might have had him in custody at that time, *had he* done his duty.

4. *Of disturbance to Possessions.*

Of this nature is that of obstructing a water-course, (23) which we shall select for our example.

1st. The count should state the plaintiff's possession of the estate (through which this water runs,) and in what parish in the county it is situate.

2d. That it is an ancient water-course, from time whereof the memory of man is not to the contrary.

3d. The obstruction, with the manner of it, and the consequences therefrom resulting.

4th. Whereby the plaintiff losing the use of the said water, or his lands becoming damaged by the overflow of it, as the case may be, he sustained damage, &c.

And a second count may be then added for a continuance of the obstruction.

5. *Of Nuisance.*

As words so plain need no definition, we shall, as in the last case, proceed to our example, by giving the necessary component parts of the primary count in a declaration against a tallow-chandler, the offen-

(23) The like holds of a right of way, or of overstocking a common, whereby the plaintiff receives an injury, and a variety of such other cases.

finens

siveness of whole manufactory rendered the plaintiff's dwelling unwholesome.

1st. The plaintiff's being possessed of the dwelling so rendered unwholesome, (24) and where situated.

2d. In which he and his family dwelt.

3d. The situation of the defendant's premises, with respect to the plaintiff's.

4th. Yet the defendant well knowing the premises, but contriving maliciously to injure the plaintiff, by depriving him of the use of wholesome air in his said messuages, &c. and premises.

5th. On the day and years aforesaid, and from thence hitherto (that is to the bringing the action) exercised the trade of a tallow-chandler.

6th. Whereby abundance of noxious vapours penetrated the house of the plaintiff, and became a nuisance to him, so that he could not reside therein with his family, during all or any part of the time aforesaid; (the time when the nuisance first commenced being mentioned in the former part of the declaration) without danger of being infected with distempers therefrom, by which the plaintiff could not enjoy the complete use of his house for himself and family, as he otherwise might have done.

The General Issue is, "Not Guilty of the premises."

(24) From the examples already given, the reader has no doubt already observed, that this beginning is a *principle* common to every declaration, where any injury is done to the plaintiff's property; for in short, in every primary count, it is usual to treat the matter historically, mentioning in *technical* terms every thing respecting the matter in dispute, between the parties, in chronological order.

Of the Declaration in a Special Action on the Case for an Injury done to the Plaintiff by the Defendant's

Cattle. to the Plaintiff by the Defendant's Cattle.

We shall here select for our example the case of the defendant's dog biting the plaintiff, by which he was confined for three weeks. The component

parts of the primary count in such case should be, 1st. That the dog belonged to the defendant.

2d. That the plaintiff well knew the dog was accustomed to bite people (25).

3d. That on the day and year aforesaid the dog (26) bit the plaintiff in so terrible a manner (describing the wounds) that his life was despaired of for a great while, to wit, for the space of three weeks, during which time he suffered great pain and anguish.

General Issue, "not guilty of the premises."

(25) And upon the trial it must be proved, that the dog has bit somebody before, otherwise let the wound be ever so bad, the plaintiff cannot recover.

(26) I once knew an action of this sort, and wherein the special pleader added a second count, "that the plaintiff was bit by a bitch." Wonderful sagacity!

CHAPTER VII.

Of DEBT. (27.)

THIS is the fifth genus, and it will be giving a sufficient definition of it to observe, that it can never be brought but for a *sum certain*; wherein it differs from *assumpsit*, which is brought for a sum contingent; for though the value of the work or

(27) Debt may be brought on a promissory note or bill of exchange.

goods,

goods, for instance may be charged at any given price, yet it lies with the jury to consider, whether they were really worth that sum or not; but in debt, the sum being *mostly* ascertained by some acknowledgment of the defendant, the jury have only to enquire whether the same be still due. Consequently in general there are but two (28) species, *v. z.* debt upon bond, and debt in covenant. Of this latter sort, for instance, may be rent reserved on a lease; but we shall first treat of the former.

1. Of Debt on Bond.

Every one knows, that a bond is an instrument given for double the debt, with a condition to it, mentioning that it shall be void on payment of the single sum. Now it is not upon the *commentary*, but upon the *original* text that the count is drawn, it being usual to declare on the penalty. Now as the *preamble* in debt differs from that in case, we have given a precedent of one; but, with regard to the remainder of the declaration, have continued our example by elements.

[*London, &c.*] The obligee complains of the obligor being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea, that he render to him the sum of 1000*l.* of lawful money of *Great Britain*, which he owes to and unjustly detains from him; and whereupon the said obligee, by his attorney, complains

1st. That the obligee by his certain writing obligatory, bearing date, &c.

2d. Sealed with his seal.

3d. Became bound to the plaintiff in the sum of (the penalty).

(28) Though debt may be brought on a promissory note, but it is *not usual*.

At the end of the declaration is then added a *proferi in curia*, as for example:

"And he brings into court here the said writing obligatory, sealed with the seal of the said defendant, which gives sufficient evidence of the debt aforesaid, in form aforesaid, the date whereof is the day and year aforesaid."

Of the General Issue.

In commenting upon the general issue to a declaration in *assumpsit*, I observed (29) that had it not been for the report in Mr. Morgan's *Vade Mecum*, I could not have conceived an attorney existed, but knew the general issue in *assumpsit*; but I will not vouch so much for the general issue to an action in debt on bond, as it has come within my own knowledge that *nil debet* has been pleaded to one; for the reader will observe, that a defendant who is sued for a sum of money upon his bond, must not say he owes nothing, although it be actually true that he has discharged the debt; but he must plead *non est factum*, that it is not his deed; or he may plead *solvit*, that he paid the money, but not *nil debet*, that he does not owe it: for, if he do, his plea may be demurred to, and he must pay costs in consequence.

2. *Of Debt in Covenant* (30).

Of this species is rent reserved upon a lease; a count of which nature we shall analyse for example.

- 1st. The preamble is the same as in the last case.
- 2d. The plaintiff must state himself seised of the premises.

(29) P. 131.

(30) All contracts under seal come under this head, unless they be bonds.

3d. That

3d. That he then made a lease to the defendant which should be voided to the end of the *indendum*.

4th. That defendant entered and became possessed of the premises.

5th. The amount of the rent, and for what time due, and when.

6th. And that it still remains unpaid.

Then the declaration concludes thus:

"Whereby an action hath accrued to the said plaintiff to have of and from the said defendant the said £ above demanded: Yet the said defendant, although often requested, &c. (as in other cases) with this difference, that the damage may be laid at *less* than the amount of the debt declared for in the count.

Of the Plea.

To this declaration the general issue is, as in the last case, *non est factum*, which denies the execution of the lease; and this is a very good plea, when the lease is expired, as then the defendant may give payment of the rent in evidence, but he cannot do so, if any part of the term yet remain: for so long as the lease continues, so long it is the lessee's deed. But according to my own opinion of the matter, that as the courts are now so liberal, the judge who tried such a case would most likely decide that it was not the defendant's deed *pro tanto*, and so let the fact go to the jury: but in ancient strictness it is otherwise.

The usual plea, however, is *nil debet*; for though that to an action of debt upon bond is a bad plea, yet to an action of debt in covenant it is a good one; but this is a special plea, to which the plaintiff replying

plying by a general negative, the defendant joins issue thereon, and upon him the proof of the payment lies.

CHAPTER VII.

OF COVENANT. (31)

THE covenant we are now about to treat of, differs from the last kind, for the reader will please to observe the distinction; there is covenant in debt, and covenant *not* in debt.

When we treated of the declaration in debt upon bond, it was on the penalty.

In debt in covenant we treated of the declaration for so much money due upon the sealed contract; but here we do not declare for any sum specifically due (32) upon the contract, but for "a breach of the covenant," to our damage of so much; the preamble is therefore the same as in case, except only that we say "in a plea of breach of covenant."

We have selected for our example a declaration by the assignee of the freehold, against the assignee of the lessee, to recover a year's rent, and damages for surrendering up the premises in bad repair, contrary to the covenant contained in the lease.

1st. The plaintiff in the preamble must state him-

(31) This ought properly to have been in the chapter of special pleas; but as it has so near a relation to what we have just been treating of, I have taken the liberty to introduce it here.

(32) Except indeed the year's rent, but the rest is *ad libitum* to be assessed by the jury.

self to be the assignee of the original lessor (33), and the defendant to be assignee of the lessee.

2d. The plaintiff must state, that at the time of making the lease, his predecessor was seised in fee of the estate (34).

3d. Of which he made a lease for a certain number of years; the counterpart whertof, sealed with the seal of the lessee, the plaintiff brings into court, the date whereof being the day and year aforesaid.

4th. The demise (but no more of the lease need be set forth, than to shew what premises were leased, and at what rent, &c.)

5th. That the lessee entered upon the estate in consequence, the reversion of the possession after the expiration of the lease being in the lessor; who being so seised thereof, and the possession during the term of the demise being in the lessee.

6th. How the lessor came to part with the estate, and then how the plaintiff became entitled to it. In short, here the plaintiff's title must be set forth, for it is *that* which qualifies him to sue.

7th. That on or about (the date of the assignment) all the interest of the lessee became vested in the defendant by assignment (35).

8th. Whereby the defendant entered, and became possessed thereof for the remainder of the term then

(33) When the plaintiff declares upon his own demise, he need not set forth his title; but upon that of his predecessor, he must. This renders these declarations often excessively long, frequently 50 or 60 folios.

(34) This is with regard to this example; but if the estate of the lessor were any thing less than a fee simple, it should be so stated.

(35) But the deed of assignment need not be recited, it is sufficient to state the fact of the lease being assigned to the defendant. But if it so happen that the defendant became assignee to the lease, before the plaintiff became seised of the fee, it should be placed in that order in the count, so that every thing that has taken place may fall in chronologically.

unexpired

unexpired in the lease, the reversion thereof belonging to plaintiff, (36) and his heirs.

9. That defendant continued so possessed till the end of the term.

10. That the term is expired, and when,

11. That the plaintiff has at all times well and truly performed the covenants on his part.

12. Yet protesting, that the defendant, since he became assignee to the lease, hath not performed the covenants on the part of the lessee.

13. For that the sum of 50*l.* (37) for one year's rent due at (when due) is in arrear, &c. contrary to the form and effect of the covenant, so made by the lessee in that behalf.

14. And the said plaintiff further saith (38), That since the plaintiff became seised as aforesaid, and since the assignment of the lease to the defendant, whereby he became possessed as aforesaid, the said demised premises were out of repair for want of the needful reparations being thereto done. (Here set forth the particular defects.)

15. And the said premises being so out of repair, the defendant permitted them so to continue until the end of the term.

16. And at the end thereof the defendant yielded the said premises up, so out of repair to the plaintiff, contrary to the tenor and effect of the lease, and of the covenant of the lessee in that behalf made.

(36) If the fact be so; but if at the time of the assignment the lessor continued still seised, it must then state the reversion to have then belonged to him, and his heirs.

(37) Or whatever the sum may be, and for what time.

(38) This is always the mode of continuing the count by a new subject; for in all pleadings whatever, if there be several grievances, they must be distinctly stated, as in this instance, the covenant for repairing, is distinct from that for payment of the rent.

17. And

17. And so the plaintiff saith, that the defendant, although often requested, hath not kept the said covenant made by the lessee with the lessor, but hath broken the same, and to keep the same hath wholly refused, &c. to the damage, &c.

Of the Plea.

In the above declaration, there are various points upon which the defendant might take issue; as first, he might deny the execution of the lease, or he might deny himself to be assignee of it.

Or he might deny the title of the plaintiff, *i. e.* that no such conveyance to him was ever executed by the lessor.

Now any of these would be a special *non est factum*, except the first, which would be a general one; but then what would it avail the defendant disputing what he was very certain before hand the plaintiff would be well able to prove (39)?

Consequently these pleas are very rarely pleaded, as the common ground we should think of a man's defending an action for rent, would be that he had already paid it; but in such case, he *must not say in his plea that he did not owe it*, because this action is not an action of debt, but of covenant; the defendant must therefore plead "nothing in arrears". (40)

Thus much for the first covenant.

(39) For which reason, why should the assignee of a lessor set forth his title in pleadings any more than the actual lessor himself, unless the defendant were to dispute it? Might it not answer every good purpose, if the plaintiff were to state briefly, that the defendant owed him so much rent, due at a certain time, and reserved on a certain demise for so long a term? And then let the defendant in his plea shew cause to the court wherefore he had not paid it; and, if that cause were a doubt of the plaintiff's title, would it not be then time enough to set it forth?

(40) *Morg. Vade Mec.* Vol. II. p. 325.

As

As to the breach of the second covenant, the plea usually is, "that the defendant did repair." (41)

Upon both which the plaintiff joining issue, the matter then goes on to trial upon these two points; so that the reader will observe, wherever a declaration contains separate heads, they must be separately pleaded to: *if meant to be disputed.*

CHAPTER IX.

Of TRESPASS.

OF trespasses there are two genera, i. e. trespass general, and trespass *per quod*. The former is, where the damage arises from the cause; the latter, where it arises from the consequence; for which latter injury, in many cases, the plaintiff has his election whether he will sue in trespass or case. Yet great disputes frequently arise as to what is trespass, and what is case.

To illustrate this, let us in passing take a few examples, not of ancient cases decided in the days of our great grandfathers, but of modern determinations. For instance;

Trespass does *not* lie against an excise officer, who enters a house to search for smuggled goods, *although he find none*. Yet *case* lies for maliciously obtaining and executing the warrant. See *Cooper* and another *v. Bqote*, in error: 1 Term Rep. 435.

But if a justice of the peace maliciously grant a warrant against a person without information, upon a

(41) This plea, as well as that of nothing in arrears, being nevertheless so much like general issues, is the reason why I introduced the pleadings between assignee and assignee among declarations and their general issues.

supposed

Supposed charge of felony; the remedy is *not* *case*, but *trespass* for the false imprisonment. *Morgan v. Hughes*, H. 28 G. III.

The leading distinction between trespass and case, it has been before observed is, that in the *one* the damages arise from the *cause*; in the other, from the *consequence*; in the former you state in your declaration, that the injury was committed *vi et armis*, i. e. with force and arms, to wit, with swords, staves, sticks and fists, and in the latter these words are not used, any more than the adverb *WHEREAS* in the preamble. But what all this has to do with cause or consequence, *abstractedly and rationally* speaking, I know not; for where is the difference, whether I suffer by a man's vice or folly? the principle of law is, that either way I shall have reparation, and as the *very* particular circumstances which attended the commission of *any* wrong, must necessarily appear by evidence, the record can form no more than the grand trunk with its anastomosing vessels, the capillaries must be ever supplied by the testimony of witnesses *present* at the transaction. I would not have any legal pedant suppose, that I mean to do away the distinction *between a tort and a debt*: for by perusing the third part of this work, he will find that I have particularly distinguished the transaction wherein the plaintiff has given a valuable consideration, from that wherein he on his part has given no consideration, but has nevertheless received some considerable injury; and to the plainest observer must this be clear, when he discriminates between an action brought for a sum of money, for work, goods, rent, or cash, which the defendant had borrowed of the plaintiff, and such like, and an action for an assault; but why not state the latter offence in the *language of the day*. Still further to shew the difficulty in many cases, notwithstanding the two radical ideas of cause and consequence, of injuries

com-

committed *with force*, and those committed *without force*. I shall just add the case of an *entry*, for the working of which it seems trespass lies; but *case* does not lie, *although the original taking be admitted to be lawful.* *Oxley v. Watts*, M. 26 G. III.

Note. Yet for all this, there are cases in which the plaintiff may waive the trespass and declare in *case*; as where the defendant hath taken the plaintiff's goods *with force*, and converted them to his own use, the plaintiff may waive the trespass and declare in *trover*. *Morg. Vad. Mec.* 1. 65.

But an action on the *case* will not lie for a mere trespass, as pulling down a wall, and taking the tiles off a house. Yet if it be alleged that the timber became rotten in consequence, then you may bring *case*. *Morg. Vad. Mec.* 1. 71. and he quotes *Semb. i. Rol. Ab.* 104. l. 5. Let us however continue our Elements,

The First Genus of Trespass may, generally speaking, be reduced to three Species, viz.

1. Trespass to the plaintiff's person.

2. ——— to his goods.

3. ——— to his estate.

1. Of the first species we gave a declaration at full length in *Tongue* against *Souse*, (42) but we shall nevertheless analyse the count, which has these component parts, viz. after the time and place, as in all other cases (43) follows.

1st. With force and arms.

2d. The commission of the assault.

3d. Other wrongs.

4th. Against the peace.

Note. It will also be recollected by the reader, that in *case*, after the preamble, the count proceeds, "For that whereas,"

(42) P. 60.

(43) Assault is not a local Action.

but in trespass, the word "whereas" must be left out, or the declaration may be demurred to. *Morg. Vad. Mer. Vol. II.* p. 253.

Trespass against the Goods.
The count must state the injury to have been committed.

- 1st. With force and arms.
- 2d. The goods damaged or carried away.
- 3d. The price of them, but no matter what sum, so it be not less than the plaintiff means to recover.
- 4th. That the goods were the property of the plaintiff.
- 5th. Other injuries, &c.
- 6th. Against the peace.

3. *Trespass against the Estate.*

This may be either to the house or land of the plaintiff, in the former case, it is "*quare domum*," in the latter, "*quare clausum fregit*," let us however analyse the count in the latter.

- 1st. With force and arms.
- 2d. The lands, (44) where situate, and in what respect injured, as treading down grass, corn, &c.

Note. There is usually added a second count, that the defendant with cattle, to wit, with horses, mares, bulls, oxen, cows and sheep trampled down, &c. and this must state, "other" the grass, corn, &c.

(44) This is a local action.

(45) I recollect an action of trespass being brought, for trespassing upon some premises in *Pall-Mall*, and the special pleader notwithstanding declared for treading down the plaintiff's carrots, cabbages and turnips there growing.

4. Of

4. *Of Trespass per quod.*

Of this genus, it will be quite sufficient to give one example, from which others may be easily formed; being for the impounding cattle which somebody *afterwards* liberated, *whereby* they were lost.

The original taking in this genus, as in the other, is stated with "force and arms," and then,

1st. The price of the cattle;

2d. And that they were the plaintiff's.

3d. The impounding them.

4th. The keeping them there till some person let them out.

5th. Whereby the plaintiff wholly lost (46) them.

6th. Other wrongs.

7th. Against the peace.

Note. As to the plea, the General Issue in *all* kinds of trespass whatever is, 'not guilty.' But for impounding cattle, the usual way is to justify by pleading specially, "that they were doing damage on the land of the defendant, and *therefore* he had a right to impound them."

(46) For in this genus of trespass, although the original taking is supposed to have been with force, yet the *damage* is stated to have arisen from a *consequence*. This genus therefore partakes of the nature of trespass and case both.

B O O K II.

CHAPTER I.

Of SPECIAL PLEAS.

Preliminary Observations.

THESE differ from general issues in this respect, *i. e.* they always *advance* some new fact not mentioned in the declaration; whereas the general issue does no more than *deny* those facts already alledged, and thereby *puts* the party *affirming* on the *proof* of them; it being a constant rule in all pleading, *that each party must prove his own averments.* The general plea therefore concludes to the country, the special one to the court, by “praying judgment if the plaintiff ought to maintain his action.” In short the Special Plea is a *question*, the general one an *answer*.

To a Special Plea, the plaintiff must of course **REPLY**, and the defendant, if he please, may then negative the new fact advanced, which is in short pleading the general issue by replication; for special pleas do not deny, *but* justify the facts stated by the plaintiff; as for instance, “in assault,” the plea of *son assault demesne*, that it was his own assault; in other words, that the plaintiff gave the first blow, (thereby implying that it was lawful to return that blow) and therefore the plaintiff ought not to maintain his action, which new fact being denied by the plaintiff in his replication to it, issue is joined, and the matter goes to trial upon this point; whereby the proof may be said to shift sides; for the defendant by justifying, puts himself in the situation

M

in

in which the plaintiff stood before, because *he* has his case to prove first, and in case he fail, any *damages*, however small, entitle the plaintiff to his *costs*, although the action be of that nature, that had the defendant's plea been no more than the general issue, the plaintiff would not have been entitled to costs, unless he had recovered a verdict for 40s. (45).

But where according to circumstances it is not prudent for the plaintiff to reply generally, he may plead a special replication, also advancing some new matter of fact, which the defendant may then negative generally, and so on either party may tender an issue as opportunity presents itself; but if the defendant be not inclined to negative the replication, he may *rejoin*, to which the plaintiff may *sur-rejoin*, and the defendant then may *rebut*, to which the plaintiff may *sur-rebut*, and here the pleadings or written altercations between the parties must finally end.

Thus as judge *Blackstone* observes, (46) the plea, replication, rejoinder, sur-rejoinder, rebutter, and sur-rebutter, answer to the *exceptio, duplicatio, triplicatio, and quadruplicatio* of the Roman laws.

Now the *reason* of pleading any of these special pleas in bar is, because the matter they usually contain, cannot be given in evidence under the general issue. (47) In cases therefore, where the matter

(45) But in assault and battery, where the defendant justifies the assault, *but denies* the battery, and the jury give a *shilling* damages; the plaintiff is nevertheless *not* entitled to his costs, unless upon the trial the judge *certify*, because the stat. of 22 & 23 Car. II. requires the assault and battery *both* to be proved to give the judge that power.

(46) *Com. Vol. III. p. 310.*

(47) If I strike another man after he has struck me, this cannot be called an assault, as I am justified in doing it in my own defence; yet if I plead the *general* issue, I cannot give this matter

matter cannot be thus specially pleaded, the fact of course may be then proved under the general issue, which can be oftener done now than formerly; but it is much to be wished, *that in almost every case the special matter could be given in evidence under the general plea*, which leaves every thing open, the fact, the law, and the equity of the case to be freely discussed on the trial, foreclosing no evidence whatever that applies to the case or is admissible, according to the course of jurisprudence; but listening attentively to all that can elucidate the truth, come from whatever quarter it may; and yet receiving nothing but what is analogous to the record. For the mode of cross examining witnesses in court, is far preferable to the niceties and intricacies of *special pleading*, which so often serve to give rise to hard cases; I am myself perfectly of opinion with judge Blackstone, (48) "*That the science of special pleading, is frequently perverted to the purposes of chicane and delay*;" for it seems to me better calculated to defend the rogue, than to protect the honest man.

Let us however proceed to give example of such special pleas, as are in most general use; first therefore of the statute of limitations, or that time wherein all actions ought to be brought.

In case (49) and in trespass, "*quare clausum fregit*," it is six years.

In assault, battery, (50) mayhem or imprisonment, it is four years. In

matter in evidence upon the trial, so that in such case, although the plaintiff has done *right*, still a verdict must go *against him* on the trial for doing what is wrong.

(48) *Com. Vol. III. 305.*

(49) To accounts between merchants the statute does not apply; and it should be here recapitulated that every personal action, *not trespass*, is called case, therefore assumpsit, &c. comes under this head.

(50) But if the defendant plead, not guilty," within six years, instead of not guilty within four years, the plea may be

In defamation, two years.

In penal actions, where the whole penalty goes to the crown, two years.

But in *qui tam*, *i. e.* where the penalty is half to the crown and half to him who sues, it is only one year.

Particular Example.

In treating of declarations and general issues, we only gave their component parts, because in the foregoing part of the work, we had given at *full length* two examples; which we deemed sufficient to shew the form, we treated therefore only of the substance. But as we have not yet given a special plea at *length*, we shall here insert one, that the reader by comparing it with the general issue, (52) may observe the *difference*.

To be uniform in our proceedings we have selected the plea of the statute of limitations to an action of assumpsit; because as we began with that species of action, it would be wrong not to continue it.

1. *NON ASSUMPSIT*, "*infra Sex Annos.*" (50)

And the said defendant by his attorney, comes and defends the wrong and injury when, &c. and *saith*, that the said plaintiff, "ought not to have or

demurred to. *Morgan's Vad. Mec.* Vol. II. p. 239. *R. Mod. Ca.* 40. *Salkeld* 423.

(51) P. 21.

(52) This is commonly pleaded with the general issue, but then it begins, "And for further plea in this behalf, the said plaintiff by leave of the court here for this purpose, first had and obtained, according to the form of the statute in such case made and provided *saith*," &c.

maintain

maintain his aforesaid action thereof against him the said defendant," *because* he saith, that he the said defendant did not, "at any time within the space of six years" next, before the day of the exhibiting the bill of the said plaintiff, against him the said defendant, "undertake and promise in manner and form as the said plaintiff hath above thereof complained against him the said defendant," and *this he is ready to verify*, wherefore he "prays judgment," if the said plaintiff ought to have or maintain his aforesaid action thereof against him the said defendant, &c.

2. *REPLICATION thereto by the Plaintiff.* (53)

And the said plaintiff, as to the said plea of the said defendant, by him above pleaded in bar, saith, that he by reason of any thing in that plea above alledged, "ought *not* to be barred from having or maintaining his aforesaid action" thereof, against the said defendant, because he the said plaintiff saith, that the said defendant, "did within six years" next before the day of exhibiting the bill of the said plaintiff, against him the said defendant, undertake and promise, in manner and form as the said plaintiff hath above thereof complained against the said defendant, and this the said plaintiff "prays may be inquired of by the country."

3. *The Similiter.*

This is then added as in other cases, thus,
 "And the said defendant doth the like."

(53) This in the present case, is the nature of the general issue in *Replication*, to the defendant's plea in bar.

(54) In case the adverse attorney be inclined to demur, he may strike out the *Similiter* and do so.

Note.

Note. For mutual debts, *see* Set off, in the Alphabetical Chapter.

Note. Having now given a special plea, with replication thereto at full length, we shall proceed in future by *analysis* only; but we shall not trouble the reader with the account of any other than such pleas as are in most common use; for special pleas, varying according to the particular case, are so extremely numerous, that to analyse them all, would more than fill a *folio*; but we shall nevertheless conclude with those universal principles, that cannot fail applying to every case.

1. *Of tender to part, and the General Issue to the Residue* (55).

The usual method of drawing this plea is, to put the *general issue* first, and then proceed.

1st. And for further plea, as to (the amount of the sum tendered) parcel of the several sums of money in the several counts in the declaration mentioned (or as the case may be.)

2d. By leave of the court.

3d. That the plaintiff ought not to maintain his action.

4th. To recover any greater damages than (the sum tendered).

5th. Because after making the promises as to the (sum tendered) and before the day of exhibiting the bill.

6th. On the day on which the tender was made.

7th. The defendant was ready and willing to pay.

8th. And then and there offered to pay.

9th. To receive which the plaintiff refused.

10th. That the defendant always has been ready, and still is ready.

11th. And now brings into court (the sum tendered.)

12th. And this he is ready to verify.

(55) See payment of money into court. Alphabetical chapter.

13th. Wherefore he "prays judgment," if the plaintiff ought to recover more than the sum tendered.

Note. A tender cannot be pleaded after a general imparlance. *Morg. Vad. Mec.* Vol. I. 103.

Replication.

To the first plea, the similitur is added the same as to other general issues; and if to the second, the plaintiff be inclined to reply generally, he negatives the tender.

But where the plaintiff takes the money out of court, and proceeds for further damages on the general issue *only*, then the following entry is made after the similitur, *viz.*

"And thereupon the said plaintiff freely accepts
"out of court the said sum of (mentioning the
"amount tendered *which must be always paid into*
"court) brought here into court, wherefore the
"said plaintiff is satisfied, the said (what the sum
"is) and the said defendant is thereof acquitted,
"and as to trying the said issue above joined, let a
"jury thereupon come, &c.

After tender made, a refusal upon a *fresh* demand vitiates it, I have therefore added the *elements* of a replication to that effect.

1st. As to (the sum paid into court) by any thing alledged in the plea, the plaintiff ought *not* to be barred from having his action.

2d. Because after the tender, to wit, on (the day of the fresh refusal.)

3d. The plaintiff requested the defendant to pay him.

4th. Which he refused.

5th. And this the plaintiff is ready to verify.

6th. Wherefore he "prays judgment," &c.

CHAPTER II.

Of I N F A N C Y.

AS infants, or persons under 21 years of age, may do any thing for their advantage, but nothing to their prejudice, there are various cases wherein they are not chargeable. This, therefore, is always matter of consideration, according to circumstances; nothing however comes under our contemplation, except *assumpsit*; yet we cannot avoid taking notice of two general rules. These are,

1st, That an infant may sue by *prochein amie*, (56) *i. e.* his next friend.

2d. And defend by guardian.

Note. For if an infant sue by attorney it may be pleaded in abatement, *Morgan's Vade Mecum*, Vol. II. 440. So if he appear by his attorney in his defence, it is *even bad*, after error. *Ibid.* 442.

As to the mode of compelling an infant to name a guardian, the plaintiff's attorney applies to him for that purpose, and in case of refusal, six days after, application may be made to the court. 2 *Wilson*, 50.

I. Of the Plea of Infancy.

1st. The defendant, by his guardian admitted by the court to defend for him, an infant under 21 years of age, comes and defends the wrong and injury, &c. and saith,

2d. That the plaintiff ought not to maintain his action.

(56) But he may also sue by guardian, who must have a warrant, but a *prochein amie* need not; both, however, must be admitted by the court.

3d. Because

3d. Because at the time of the making the promises mentioned in the declaration, he, the defendant, was an infant under twenty-one years.

4th. What his age was at the suing out of the writ (though any under age will do, still the plea may as well be exact as not).

5th. And this he is ready to verify.

6th. Wherefore he prays judgment.

2. Of the Replication.

The plaintiff, if he please, may negative the defendant's minority; but in such case he ought to be well assured, that the defendant will be unable to establish his averment. However, what most commonly happens is, that when actions are brought against infants, they are for *necessaries* (57); for which reason we have selected the elements of such a replication.

1st. That the plaintiff ought *not* to be barred from maintaining his action.

2d. Because the work and labour mentioned in the first and second counts of the declaration, were the work and labour of the said plaintiff, as a *tailor*, in making wearing apparel for the defendant.

(57) We have rather here chosen a replication, brought by a tailor for the making of clothes, as there are very few infants for whom a gold repeater would be deemed a necessary. I recollect an action, brought by a hair-dresser against an attorney's clerk, who was an infant, and it was urged by the counsel for the plaintiff, that his lordship would not like to see an attorney's clerk, who was certainly in the character of a young gentleman, appear in court with his hair about his ears, like a slob; but the judge, who to my knowledge has often waited half an hour of a *Nisi Prius* morning on the bench, rather than strike the causes out of the paper, seemed clearly of opinion that hair-dressing to an attorney's clerk was *not necessary*, and therefore the plaintiff was *non-suited*.

3d. Fitting

3d. Fitting to his degree.

4th. That the goods sold and delivered, mentioned in the third and fourth counts, were also fitting to the defendant's *degree*.

5th. And that the money laid out, mentioned in the fifth count, was for the purchase of divers "other" clothes fitting to his degree.

6th. And this the said plaintiff is ready to verify.

7th. Wherefore he prays judgment.

3. *Of the Rejoinder.*

The usual rejoinder to the above replication is, that the cause of action is *not for necessities*; it must therefore conclude to the country as being the denial of a fact. These are its elements, viz.

1st. That the wearing apparel and clothes were *not necessary* and fitting to the defendant's *degree*.

2d. That the work and labour were *not fitting* to his *degree*.

3d. Nor were the clothes lastly mentioned *fitting* to his *degree*.

Note. Upon this issue the matter goes to trial, and the point to be decided is, whether the clothes furnished for the infant were fitting to his *degree*, or *not*; for which reason the plaintiff ought to be prepared with evidence to state what the defendant's degree was at the time he had the things; this being the *pivot* upon which the whole turns.

Also see INFANT in the alphabetical chapter.

It will not now be necessary to give any further examples. Suffice to observe only, that all special pleas whatever have these

Universal Principles.

1st. That the plaintiff ought not to maintain his action.

2d. The reason why.

3d. And which the defendant is ready to verify.

4th. Wherefore he prays judgment.

And these hold *vice versa*; and all pleas being special must be signed by counsel, except the following.

In King's Bench.

1. *Comperuit ad diem*, to a bail bond.

2. *Son assault demesne*.

3. *Plene administravit*.

4. *Riens per discent*.

5. *Nul tiel record* (58).

6. *Per minas*.

7. *Per dures*.

8. *Solvit ad diem*.

9. *Ne unques executor*.

10. *Infancy*.

In Common Pleas.

The same pleas must be signed by a serjeant, and the replications must be so too.

(58) When the defendant pleads a judgment recovered, the plaintiff replies *nul tiel record*, that there is no such record; it is therefore incumbent upon the defendant to produce that judgment, which he can very rarely do, this being chiefly made use of as a *sham* plea to get over the term.

The production of the judgment is to the judges, not to a jury; and it is called trial by record.

B O O K III.

CHAPTER I.

Of REPLEVIN.

I CANNOT quit the subject of special pleading, without giving somewhat at length the action of replevin, as differing from all others, the pleadings therein being of a nature peculiar to themselves. In the commencement of this work, we tried an issue of fact, wherein the plaintiff held the affirmative side of the question: in replevin, however, the case is generally altered, as it mostly happens that the *plaintiff* holds the *negative*, and the *defendant* the *affirmative*. Consequently the defendant's counsel at trial opens the case of his client first; the pleadings, as in other cases, being previously opened by a junior; and it is common for both parties to have two counsel, as both are actors, and either may take the record into court.

I need hardly observe, that the use of this action is to recover goods illegally taken in distress.

Supposing therefore a seizure to be made, and the tenant inclined to replevy his goods, the mode of doing it is by his entering into a *bond to the sheriff*, with two sureties besides himself, who must be responsible housekeepers. This bond is usually given for double the value of the goods distrained, and is commonly executed at the sheriff's office; the condition of it being to *prosecute the suit with effect*, and return the goods, provided the distress appear to be illegal.

illegal. This being done, the goods are restored to the tenant, who then, in order to prevent the bond being forfeited (59), must prosecute his suit accordingly. It is usually commenced by plaint in the sheriff's court, and then removed into the court of K. B. or C. P. by *recordari facias loquelam*, commonly called *re. fa. lo.*

We shall now proceed to our particular example, taking the same mode of arranging the proceedings by plaintiff and defendant as in *assumpsit*.

Particular Example.

Plaintiff.

1. *How to sue out the Re. fa. lo.*

The attorney having taken a warrant to prosecute, as in other cases, makes out a *præcipe*, which he leaves with the *curfitor* of the proper county, who prepares the *writ* by the time required.

2. *Of getting the Writ returned.* (60)

This is done by leaving it at the sheriff's office for
that

(59) The proceedings on replevin bond are similar to those on bail bond; and it may be assigned by indorsement to the avowant, or person making consurance, in four days, exclusive after the time therein limited for the plaintiff to prosecute his suit.

Note. But if before avowry or consurance the plaintiff be nonsuited, the action must be brought in the name of the sheriff.

But the court may give relief, on motion, which operates as a defeasance.

The statute, which treats of replevin, is the 11th G. II. c. 19. but this is only with regard to goods seized for rent, all other replevins being on the common law.

(60) To get the writ returned in due time is what ought never to be neglected, as it may cause considerable dispute, and of course

Plaintiff.

that purpose, and in a few days fetching it from thence again.

3. *Of the filing it.*

The writ must be then filed with the filacer, which, to prevent disputes, should be done immediately when fetched from the sheriff's office.

Note. Nothing need be observed as to defendant's appearance, it being the same as in any other case, where appearance is entered with the filacer. See original Alphabetical Chapter.

course expense in applying to the court; it should therefore be immediately taken from the sheriff's to the filacer's, as I do not believe the practice is *distinctly* settled as to what time the courts allow for the filing it, in the case of the cause being removed by the plaintiff; but when removed by the defendant, two terms are allowed. It is the opinion, however, of most gentlemen conversant in this branch of practice, that the like time is allowed to the plaintiff. And upon a motion in *Scott v. Mitchell*, in C. P. Trinity Term, 1790, it appeared that the writ of *re. fa. lo.* had not been filed till five or six days after the return, when it was contended on the part of the defendant, that it should have been filed upon the return; but on the suggestion of one of the secondaries, that in case the sheriff were *tarde* in his return, the plaintiff must have time to rule him, and therefore ought not to be punished for the sheriff's neglect. The judges were unanimously of opinion that the *re. fa. lo.* had been filed in time.

However, the safer way is, when the sheriff is *tarde*, to sue out an *alias re. fa. lo.* and then a *pluries*. See *Marg. V. Met.* Vol. II. 131. also *Sellen's Analysis*, p. 84. Though there can be little doubt but the same time is allowed to the plaintiff as to the defendant; for security being given to the sheriff, the defendant cannot be injured.

CHAPTER II.

Of the DECLARATION in REPLEVIN.

CHAPTER II.

*Plaintiff.**Of the DECLARATION.*

Preliminary Observations.

NO notice herein need be taken of the proceedings in the court below. The intent of it is to demand of the defendant the *reason why he took the plaintiff's goods*; but as it differs from all others, and not being long, we have preferred giving an example at length, viz.

Particular Example.

(61) *Middlesex*, ff. The defendant, late of &c. was *summoned* to answer the plaintiff of a plea, wherefore he took the goods and chattels of the said defendant, and them unjustly detained against gages and pledges, until, &c. And whereupon the said plaintiff by his attorney complains, that the said defendant, on the (62) day of in the year of our sovereign lord the now king, at *Westminster*, in the county of *Middlesex*, in a certain messuage (63) or dwelling-house of the said plaintiff

(61) The venue may be either in the county wherein the goods were originally taken, or if cattle, *in that* into which they were afterwards driven.

(62) The day the seizure was made.

(63) The *locus in quo*, or place wherein the goods, &c. were taken, must be always mentioned, or it is cause of *special demurrer*; for it is not sufficient to mention the town and county, but the house or field, &c. must be also stated, wherein the goods or cattle were at the time of their being seized.

there,

CHAPTER II.

Defendant.

AVOWRY.

Preliminary Observations.

THE defendant in replevin does not plead as in other actions, but usually makes avowry if landlord; if *steward* or bailiff then he makes *conusance*, which is in the same nature: either of which may not be improperly defined the *defendant's declaration*, as herein he sets forth his reasons why he distrained the plaintiff's goods; unless indeed that the accusation be totally false, then the defendant may, as in other cases, plead the general issue, which in replevin is *non cepit*, that he did not take the goods, &c. (64); or if the *locus in quo* in the declaration be not right, he may plead *cepit in alio loco*, that he took the cattle in another place (65); but really, in my opinion, this latter is rather quibbling than pleading; for surely the main question is whether the defendant took the goods or not, and not the particular place.

Or *non cepit* may be pleaded to part. *Morg. Vade Mec.* Vol. II. 136.

Or if the goods taken were actually the defendant's property, he may plead that matter in bar.

But as it most commonly happens that when replevin is brought, the goods have actually been distrained by the party against whom it is brought; and that the goods taken were really the property of the

(64) 1 Bro. Ent. 312.

(65) Barnes, 353. *Morg. Vade Mec.* V. II. 138.

Plaintiff.

there, took the goods and chattels following, to wit, (here set forth the goods or cattle, and their (66) price) of the said plaintiff, and them unjustly detained against gages and pledges, until &c. wherefore the said plaintiff saith he is injured, and hath sustained damage to the value of one hundred pounds, and therefore he brings his suit.

Note. The declaration is the same in one court as in the other, it being always supposed to be founded on original, and the time for delivering it the same as in other cases.

(66) The regular form, if goods, is to say of the price; if cattle, of the value. *Morg. Vade Mec.* V. III. 591. though you may set any price or value, or lay your damages at any amount; and if cattle, &c. be taken in two counties, it must mention how many were taken in one, and what number in the other.

Defendant.

plaintiff at the time; and not of the defendant; the common and ordinary proceeding after the declaration is delivered is, for the defendant to make avowry or confession, the time for doing which is the same as that for pleading. We shall therefore give an example at length of an avowry, supposing the goods to have been seized for a year's rent.

Particular Example.

And the said defendant by his attorney, comes and defends the wrong and injury, when, &c. and well avows the taking of the said goods and chattels in the said messuage or dwelling-house, in which, &c. and justly, &c. because he says that the said plaintiff, for the space of one half year next before, and ending on the feast of *St. John the Baptist* (67), in the year of the reign of our sovereign lord the now king, and from thence until and at the said time when, &c. held and enjoyed the said messuage or dwelling-house, in which, &c. with the appurtenances as tenant thereof, "under a demise thereof theretofore made to him," at the yearly rent of 100*l.* (68) "payable half yearly," (69) at the feasts of *St. John the Baptist*, and the birth of our lord *Christ*, by equal portions: and during all that time held the same of the said defendant; as his tenant thereof, at the rent aforesaid; and because 50*l.* (70) of the rent aforesaid for one half year ended on the feast day of *St.*

(67) Or when else due.

(68) The exact amount of the annual rent.

(69) How the rent is reserved in the lease, &c. should be mentioned; for unless a yearly rent be made payable quarterly, or half yearly, no distress can be made till the end of the year.

(70) The exact sum due.

Defendant.

John the Baptist in the year aforesaid, was at the said feast-day in that year, and also at the said time when, &c. unpaid and in arrear to the said defendant from the said plaintiff, the said defendant well avows (71) the taking of the said goods and chattels in the said messuage or dwelling-house, in which, &c. and unjustly, &c. for and in the name of a distress for that rent, so being due, and in arrear, and unpaid to him the said defendant as aforesaid, which said rent still remains due and unpaid; and this he the said defendant is ready to verify. Wherefore he prays judgment, and a return (72) of the said goods and chattels, together with his costs and charges, to be adjudged to him according to the form of the statute in such case made and provided, &c.

(71) In consufance, it is "well acknowledges."

(72) This alludes to the nature of the execution.

CHAPTER III.

OF PLAINTIFF'S PLEA in BAR.

Plaintiff.

CHAPTER III.

OF PLAINTIFF'S PLEA in BAR.

Preliminary Observations.

THE defendant having delivered his avowry, with notice to plead thereon as in other cases, the next step taken by the plaintiff is to plead in bar, and herein he has all the advantages common to a defendant in other respects, as he may take issue on any point in the avowry, or demur, or plead in bar specially, advancing some new fact, according as the nature of his case may require.

But let it be observed, that the plaintiff in replevin can in no case compel the defendant to set forth his title, although he himself may plead *his*; as suppose the estate to be his own freehold, for instance: and if that fact be proved, it then becomes evident that the defendant had no right to distrain: but as the setting out titles in pleadings is somewhat difficult, and at all times expensive, it is rarely done.

Indeed a special plea never should be drawn in any case wherein a general one will answer the purpose. The fact stated in our avowry was a demise at a yearly rent of 100*l.* to this the general issue is *non demisit*, "that the defendant made no such demise," and this upon the trial answers every purpose of the plaintiff; except that of recovering damages for the trespass. Because, if the defendant be unable to prove the *letting* by him, and *hiring* by the plaintiff, the latter of course must have a verdict, in which the damages can be only *nominal*, as a shilling for instance; and a future action may be brought to recover damages for the trespass; but I see no reason, if the

Defendant.

CHAPTER III.

I S S U E.

THE plaintiff having delivered his plea, if issuable as in our example, the defendant's attorney then adds the *similiter*, and issue being thus joined, the record is engrossed and passed as in other cases; but as in replevin both parties are *attors*, either may take the record down to trial, but usually the attornies agree upon this between themselves.

Plaintiff,

the title be clear, though it *be* expensive to set it out, why it should not be set out, where so gross a trespass is committed, as for one man to seize the goods of another, having no claim whatever to the premises (73).

However it must be admitted, nine times in ten, when goods are seized, they are really so for rent due; still if there be nothing due, or where the rent has been paid, it is right that the tenant should have a means of defending himself, so that the truth or falsehood of his assertions may appear upon the trial. In cases therefore where a demise to the plaintiff has been made, the most common plea in bar of the defendant is "nothing in arrear," which is the general issue to the second fact stated in our avowry; we shall therefore select that for our

Particular Example (74).

Nothing in Arrear.

And the said plaintiff saith, that by any thing by the said defendant in his said avowry above alledged,

(73) An instance of this kind I once knew. A gentleman who had been formerly in the navy, but having retired upon his half pay, purchased a house for his own residence; seven years after a fellow came, to whom he was a total stranger, and said it was his house, demanding near 200 l. for rent. It is natural to suppose that my friend treated the new acquaintance not very civilly, but told him to go about his business; however, in a few days after, an *attorney* applied to him, and actually distrained his goods to near the above amount; upon which he was under the necessity of replevying them, and on the trial of the action, had a verdict upon the issue joined on the plea of *non demisit*, with one shilling damages only.

(74) If money be owing from the landlord to the tenant, this should be pleaded specially, besides nothing in arrear, as the latter applies to the rent only. But *see Set Off* in the Alphabetical Chapter.

he

Plaintiff.

he ought not in his own right to avow the taking of the said goods and chattels in the said messuage and dwelling house, in which, &c. to be just; because as to the said sum of 50*l.* in the said avowry mentioned above, and supposed to be due and in arrear to the said defendant, for one half yearly payment, ending on the feast day of *St. John the Baptist*, in the said year of our lord the now king, he the said plaintiff saith, that nothing of the said rent at the time of the taking, &c. was in arrear and unpaid, as by the said avowry is above supposed, (and concluding to the country.)

Note. On the trial of this issue, according to our example, the defendant, and *not the plaintiff*, holds the *affirmative* side of the question; and therefore his junior counsel first opens the pleadings: then the senior states the case to the court and jury, and the trial proceeds as in other cases, with no other difference, except that in this issue the defendant is considered in the nature of plaintiff, for whom we shall suppose a verdict to be given, and thus proceed to execution.

See Defendant, Chapter III.

CHAPTER IV.

Of EXECUTION.

THE execution is the writ of *retorno habendo*, (75) that is for the plaintiff to have the goods restored him, which he had before distrained, the distress by the trial being deemed legal; but if the goods be made away with, as is sometimes the case, "before an assignment can be taken of the replevin bond," the execution should be got returned by the sheriff, "*elongata*," that the goods, &c. are removed.

Non Pros.

Note. If the plaintiff suffer himself to be non prossed, the defendant may then enter up judgment, *pro retorno habendo*, making a suggestion in the nature of an avowry or confession, to ascertain to the court the cause of distress, and then he must execute a writ of inquiry, that the sum due may be ascertained before he signs final judgment. So that *Non Pros in Replevin*, the reader will observe is similar to *Judgment by Default* in other cases.

(75) At the same time the defendant may sue out further execution by *ca. sa. fi. fa.* &c. for his costs.

ELEMENTS OF SPECIAL PLEADING.

B O O K IV.

Of E F F E C T M E N T

CHAPTER I.

Plaintiff.

B O O K IV.

CHAPTER I.

Of EJECTMENT.

Preliminary Observations.

IN the first book of *this* part of our work, we divided all actions into two primary genera, *i. e.* personal and real, and having already treated sufficiently at large of the former, we shall now proceed to the latter; during our dissertation on which, the reader will please to avail himself of the useful knowledge to be gained by analogy; we observed before, that ejectment is called a mixt, not a real action, but as it can only be brought to recover real property, the reader will most likely think with me, that "real" is its proper name. I do not enquire into what things were in the days of our great grand-father's progenitors, I am writing the history of my own time, not but I dare affirm our ancestors managed things in those days suitable to their knowledge and abilities; it is therefore our duty to do so as well in our days, deriving at the same time all the benefits resulting to us from the improvements we have made on former ages. Had our ancestors gone on in the beaten path, like *their* forefathers, we should not have been what we now are; they improved, and therefore we ought to do the same.

The nature of the action of ejectment is equally with that of assumpsit well worth the reader's attention; by the latter personal property, from the
smallest

Defendant.

B O O K IV.

CHAPTER I.

Of E J E C T M E N T.

Preliminary Observations.

WHENEVER a tenant is served with a declaration in ejectment, he should without delay, deliver it to his landlord, for he is liable to forfeit three years rent in case of neglect.

And the landlord by leave of the court, may be made defendant instead of his tenant; (73) so indeed may any other person, claiming title either to the whole or part.

That the landlord may appear either by himself, or jointly with the tenant, a brief to move for that purpose is given to counsel, and leave is granted of course, on condition that he enter into the usual rule of confessing "lease, entry and ouster;" and there is no need of any affidavit, but the rule is drawn up at the clerk of the rules, a copy made of it, and annexed to the plea; to which is also added the common consent rule.

Note. Generally speaking no person can be any gainer, by not appearing agreeable to the notice; indeed this is a rule which holds good in most cases, it being the duty of every citizen when called into law, immediately to obey the summons.

In case of ejectment, if appearance be neglected, judgment may be obtained against *Richard Roe* the casual ejector, and the occupier of the premises of course is turned out of possession by the sheriff.

Plaintiff.

smallest to the greatest amount is regulated; by the former, any estate of value, however great or minute, or of a tenure for ever, for life, or for years, may be recovered.

The statute of limitation is twenty years, but any entry made within that time saves it. Entry is effected by laying hold of the latch of a door, or taking a piece of earth in your hand, according as the estate may be, either house or land, or both, declaring at the same time the purpose for which such act is done; and when the estate is in different counties, different entries should be made; the like if it be let to different tenants. (76)

Note. This claim holds good for a year and a day, and may every year be repeated.

In bringing this action, the first thing to be observed is, "whether there be a tenant in possession," because if the premises be totally empty, a lease must be made of them to some actual person, (77) who in consequence of it enters on the estate, and being turned out by some third person, the *actual* lease, entry and ouster is *complete*.

This the reader will observe is altogether but a *fiction* of law.

Note. At the time of sealing and delivering the lease upon the land to the lessee, by the owner or his attorney appointed by letter under seal; a fourth person delivers a declaration in ejectment to the third person, who turned the second or lessee out. The action therefore, the reader will observe is in the nature of

(76) See *Black. Com.* 3. 175.

(77) But whether the premises be occupied or empty, if the action be to recover possession for non payment of rent, under the stat. of the fourth of G. II. there needs no actual lease, &c. to be made, but the declaration needs only be stuck upon the door, or when the estate is in land on some notorious part thereof.

an

Defendant.

The first object of observation on the receipt of a declaration, ought to be the court in which the action was commenced; and if in *B. R.* whether by bill or original, the blank rule for *B. R.* may be bought at the stationers, but for the *C. P.* it is to be had only of the secondary. If proceedings be in *B. R.* by bill, the appearance is entered with the clerk of common bails, if by original with the *filacer*, and if in *C. B.* with the *filacer* of the proper county, who stamps the rule, and in *B. R.* the rule, &c. is left at one of the judge's chambers; but in *C. P.* with the prothonotary.

The appearing and pleading although distinct in themselves, are yet done at one and the same time. But let us proceed to an example of the mode of appearing and pleading by the tenant in possession, supposing the declaration to have been by original.

PARTICULAR EXAMPLE.

Rule of Court.

Hilary Term in the thirty-second Year of King George III.

Stormont and Way.

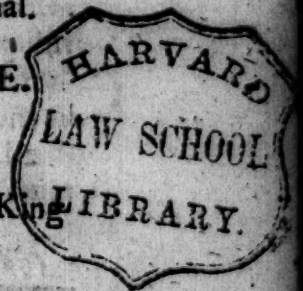
[*Herts.* to wit] *Doe* on the demise of *Johnson* against *Roe*, for two messuages, two barns, two stables, 1000 acres of arable land, and 500 acres of pasture, at *A.* in the county of *Herts.* (74)

It is ordered by consent of the attornies for both parties, that *James Thomson* be made defendant, in the stead of the now defendant *Richard Roe*; and do forthwith appear at the suit of the plaintiff, (75) and

(74) If the action be to recover only a part; say *part* of the premises expressed in the declaration,

(75) If by bill, add, " and file common bail."

receive



Plaintiff.

an action of trespass for this "ejectment." But as it does not so often happen that estates are found without owners, as with, we shall select for our example the mode of proceeding, when the estate is in some person's possession. In such case, no part of this former fiction of lease, entry and ouster is used; but another fiction, wherein the lease, entry and ouster are not actually made, but only supposed so to be, and must therefore be confessed by rule of court, so that in short, it may be called one fiction upon another. (78)

Let us however proceed to our

PARTICULAR EXAMPLE.

1. Declaration. (79)

Printed forms are to be bought at the stationers, in the filling up the blanks of which, the following things are necessary to be observed.

1st. The venue must be laid in the county wherein the estate lies.

2d. The day of the commencement of the demise must be after the title of the lessor (80) of the plain-

(78) As some of my readers like *Don Quixote's* squire *Sancho*, may wish to know who was the first tumbler; it is my duty to inform him, it was Lord Chief Justice *Rolle*, who sat in the court of *King's Bench* (1) during the exile of King *Charles II.* who contrived what *Blackstone* calls this string of legal fictions.

(79) This in ejectment is the *first proceeding*, no writ being necessary whether by original or by bill, and the former ought always to be preferred, because in case error be brought, it must be in parliament in the first instance.

(80) This is the person, who actually claims the estate, but he does not bring the action in his own name, but in that of *John Doe*, of whom we have often had occasion to speak as a fictitious person; the defendant is likewise fictitious being *Richard Roe*. The style of the cause is therefore *Doe*, on demise of *A. B.* against *Roe*.

(1) Then called the court of upper bench.

tiff

Defendant.

receive a declaration in an action "of trespass and ejectment" for the premises in question, and forthwith plead thereto, "*not guilty*," and upon the trial of the issue, confess "lease, entry and ouster," and insist upon the title only, otherwise let judgment be entered for the plaintiff, against the now defendant *Richard Roe* by default; and if upon the trial of the issue, the said *James Thompson* shall not confess lease, entry and ouster, whereby the plaintiff shall not be able further to prosecute his writ (76) against the said *James Thompson*, then no costs shall be allowed for not prosecuting the same; but the said *James Thompson* shall pay costs to the plaintiff in that case, to be taxed: and it is further ordered, that if upon the trial of the said issue, a verdict shall be given for the said *James Thompson*, or if it shall happen that the plaintiff shall not prosecute his said writ, for any other cause, than for not confessing lease, entry and ouster: then the lessor of the plaintiff shall pay to the said *James Thompson*, costs in that behalf to be adjudged.

By the Court.

Attorney for the Plaintiff.

— for the defendant.

The plea must be the General Issue, "*Not Guilty*," as expressed in the rule, *to which it is always annexed.*

Then an appearance is entered with the *filacer*, thus,

[*Herts. ff.*] Appearance for *James Thompson* at the suit of *John Doe*, on the demise of *Thomas Johnson*.

(76) If by bill, say, "*his bill*."

Plaintiff.
tiff accrued, otherwise the plaintiff will be nonsuited.

3d. The commencement of the supposed lease (81) must be before the supposed ejectment, but yet if the title accrue in vacation, you may deliver the declaration as of the preceding term.

4th. The estate must be described with sufficient accuracy, that the sheriff in case it be recovered may know what he ought to take in execution, to put the lessor of the plaintiff or claimant in possession of.

At the end of the declaration is added the following notice, *viz.*

Mr. James Thompson, (82)

I am informed that you are in possession of or claim title to "the premises mentioned in this declaration of ejectment, or to some part thereof;" and I being sued in this action as a casual ejector, and having no claim or title, do advise you to appear next *Hilary* term, (83) in his majesty's court of *King's Bench*, by some attorney of that court, and then and there by a rule to be made of the same

(81) In the action brought afterwards for mesne profits, the plaintiff cannot recover for any longer time, than from the commencement of the supposed lease, whatever he may be otherwise entitled to; it is therefore the proper way to lay it directly after the claimant's title accrued: but lest there be any mistake respecting this point, the special pleaders usually lay two demises, which mode of doing the business renders the declaration just *double the length*.

(82) The name of the tenant in possession.

(83) If the premises be situate in *London* or *Middlesex*, the notice to appear should be the first day of the succeeding term; but if in the country, to appear as of the term generally, our notice therefore supposes the venue to have been laid in the country.

court,

Defendant.

At the same time the plaintiff's attorney, must, as in other cases, file his warrant to prosecute; and the *filacer* having signed the rule, and written on it "appearance entered," the attorney then leaves it at one of the judges chambers.

Plaintiff.

court, cause yourself to be made defendant in my stead, otherwise I shall suffer judgment to be entered against *me*, and you will be turned out of possession.

Your loving friend.

Richard Roe. (84)

(Day of the month.)

2. *Of the Delivery:*

The declaration and notice ought to be personally served on the tenant in possession, yet if he cannot be found, service on his wife, son or daughter will do; and it should be before the Essoin day, or the tenant is not bound to plead till the term after that named in the notice.

See Defendant, Chapter I:

3. *Of the Issue.*

This is made up, of the same term, with the plea, but without a memorandum, when by original; but with one if by bill; and inserting in either case the real defendant's name instead of that of the casual ejector. and say, "of a plea of trespass and ejectment," in all other respects it is the same as in our example in assumpsit, in the first part of this work; differing only of course as the pleadings differ.

Note. As the notice of trial in ejectment, and all proceedings resulting therefrom, are similar to other cases, we refer the reader to our example in Assumpsit. P. 46.

(84) But in case the premises be *unoccupied*, the ejector ought to be some real person as well as the lessee.

4. *Of*

Plaintiff.

4. *Of Execution.*

The execution is the writ of possession, but in substance, analogous to other executions; in short, it is the King's letter to the sheriff commanding him to deliver the estate to the victorious party; besides which, an additional execution is taken out, being usually either a *ca. sa.* or *fi. fa.* in the common way for the costs; and if the verdict be for the defendant, he may have a *ca. sa.* or *fi. fa.* in like manner,

CHAPTER II.

*Of Proceeding in Ejectment by Landlord against Tenant,
under the 4th. G. 2. c. 28. s. 2.*

WHEN half a year's rent (85) is in arrear, and no sufficient distress can be had upon the premises, (86) the landlord having power of re-entry, (87) may bring an ejectment to turn the tenant out of possession. As to the mode of proceeding, it is the same as in other cases, except that whether the premises be occupied or empty, no actual lease, entry or ouster is made, but nevertheless confessed by rule according to our example above. See Tenant.

(85) (86) (87) These three facts must be proved upon the trial; for which reason power of re-entry should always be reserved in leases and agreements. For if judgment be even suffered by default, still an affidavit of these facts must be made before it can be signed.

Tenant.

CHAPTER II.

Of Proceedings in Ejectment, &c.

A TENANT may prevent himself being ejected, *i. e.* he may preserve his premises.

1. By paying the rent and costs before execution.

2. Or any time within six months, he may file a *bill* in equity for relief, but in such case he must bring into court (within forty days after the landlord has put in his answer) so much rent and costs, as the landlord swears to be due, there to remain till a hearing; when the tenant may be relieved according to circumstances.

CHAPTER III.

Of Judgment against the casual Ejector.

THIS cannot be signed without a motion (88) being first made for judgment against the casual ejector, upon which a rule *nisi* is drawn up, that unless the tenant appear within the time mentioned therein judgment may be signed.

This motion must be grounded upon an affidavit (89) of the service of the copy of the declaration, and also of the three facts just mentioned (if ejectment be for rent in arrear.) The counsel puts his name to the declaration, and gives it to the clerk of the rules in *B. R.* or secondary in *C. P.* with the affidavit.

The above motion may be made (if the estate be in *London* or *Middlesex*) the first day of the term,

(88) But first the claimant's attorney should search at the *filacer's* for the defendant's appearance.

(89) This affidavit is well worthy the reader's observation, it is analogous to that in other actions, wherein after service of process the defendant neglecting to appear, the plaintiff files an appearance for him, but before which some person must make affidavit of the due service of process; so that hence results that admirable principle of the English law, that no man can be deprived of his liberty, (1) without evidence of a proper service of some proceeding upon him, nor can his property in any way be touched, and herein the courts agree, the practice being just and uniform. What therefore we want as improvement in the practice of our law is, that when a defendant is arrested, he ought not to be so long detained before his cause is decided. Nor should the plaintiff be put to so heavy an expense before a decision can be obtained. See Arrest in the *third* part of this work.

(1) Except by Arrest, and before then an affidavit must be made of the debt.

and

and the tenant has but four days after to appear *inclusive*; but if not made before the four last days of term, he has then till two days after the *Essoin* day of the subsequent term.

Note. A distinction ought here to be taken, very necessary on the part of the claimant of the estate to be known; that is, as to the time which the defendant has to plead, provided the venue be laid in any other county than *London* or *Middlesex*; for although the notice to plead be in *Easter* or *Michaelmas* term, yet the tenant has till four days after the subsequent term, because they are issuable terms, *i. e.* those terms before the assizes, and in counties where the assizes are held only *once* a year, defendant has till four days after the conclusion of the issuable term preceding such assize. Hence the reader may collect this principle, "that the law is contented, so the plea be delivered at any time within four days after the term, next before the assizes, in which the action is intended to be tried. The declaration being however delivered before the *Essoin* day of the term, in which the defendant is required to plead."

Motion for Judgment.

The plaintiff must therefore regulate his motion for judgment accordingly.

The next object of our consideration is, when he *must* move for it, which in *B. R.* is the same term in which the defendant was required to appear; but in *C. P.* if the notice were to appear in *Easter* or *Michaelmas* term, there is no need to move till the next issuable term.

Note 1. If the notice be to appear in *Hilary* or *Trinity* term, the motion may be made the last day of term.

Note 2. If the tenant neglect to appear according to the rule obtained by motion, *no rule to plead* need be given.

Note 3. It is impossible to quit the subject of ejectment, without admiring how beautiful and simple the action would be, were it brought originally in the name of the proper claimant against the proper tenant of the estate, and unentangled with the rule to confess lease, entry and ouster.

ALPHABETICAL CHAPTER.

B O O K V.

ALPHABETICAL CHAPTER.

Containing all those Matters which would have deranged the Order of the Work, had they been placed elsewhere.

A B A N D O N M E N T.

THE owner of a ship is not entitled to abandon her, unless at some period of the voyage, there have been a *total* loss; and if the ship arrive safe, the circumstance of her not being worth repairing will not make the loss *total*. The defendant had insured on the *Friendship from Wyberg to Lynn* 100*l.* for two guineas, and having offered to pay the plaintiff 48*l.* the amount of the damage sustained, *he refused it*, and brought his action: when defendant paid the money into court and pleaded the tender. The jury gave a special verdict "that the damages did not exceed that sum," which the court afterwards *affirmed* upon the ground, that the remaining materials might make up the full 100*l.* *Cazelet and others v. St. Barbe, Term Rep. 1. 187.*

A B A T E M E N T.

When the cause of action arises *ex delicto*, as in assault, slander, &c. where the injury is directly against the person, the suit abates by the death of either plaintiff or defendant; but in personal actions, respecting injuries done to the *property*, it is different;

204 ALPHABETICAL CHAPTER.

ent; for suppose there be two plaintiffs, and one die between the time of any one proceeding, and that of the next, the rule is for the survivor to enter a suggestion upon the record of that fact; by which means, the interest of the deceased devolves on him, or upon the deceased's executor or other representative having right thereto, as the case may be, and the title of the complaining party is altered accordingly.

With regard to pleading in abatement, no suit can abate unless the cause *wherefore* it ought be pleaded; and the plea must be delivered within four days after delivery of declaration, (1) although *no rule to plead* be given, and be supported by an affidavit of the truth of its contents.

Nota. The four days allowed for pleading in abatement are both inclusive. *Jennings & Webb, T. 26 G. III.*

ADMINISTRATOR.

Where the defendant bound himself as administrator to abide by an award, touching matters in dispute between his intestate and another; and the arbitrators award that *as administrator he ought to pay*, he cannot afterwards plead *plene administravit*, "for by submitting to the award he admits assets." *Barry v. Bush, E. 27 G. III.*

AGENT.

A person treating as agent for government, is not liable to be sued upon contracts made by him

(1) If the declaration be filed, it must be first taken out of the office.

in

in that capacity. *Macbeath v. Haldimand*, E. T. 27 G. III.

Nor is he answerable, though even he contract by deed. *Unwin v. Wolseley*, E. 27 G. III.

A plaintiff is bound by the acts of his attorney's agent in town. *Griffiths v. Williams*, E. 27 G. III.

ANNUITY.

The consideration of an annuity, being partly for a debt antecedently due for goods, and the residue thereof money paid at the granting. The grantee may recover the *whole* consideration in an action for money had and received, if the annuity be set aside for informality in registering the memorial. *Shove v. Webb*, E. 27 G. III.

APPRENTICE.

1. *Of the Prosecution.*

By the 5th. *Eliz. c. 4.* No person ought to exercise a trade, who has not served as an apprentice for seven years, on pain of the penalty of 2*l.* a month; but this statute is very sparingly put in execution: in short none, but what were traders at the time of the making it, are deemed to come within its meaning: and this too must be alledged in the declaration or indictment, it being one of those things for which either prosecution will lie; but then only such trades are within the equity of the act as require skill, of which circumstance the jury are to judge.

2. *Of*

2. *Of the Defence.*

There seems therefore to be two questions necessary to sustain the defence to an action of this nature. 1st. To shew that the trade is of that nature as not to require so long a servitude; and 2dly. What constitutes a good service, if skill be deemed necessary. To answer this latter question, the case needs only be quoted of *Peaks v. Johnson*, H. 1 An. at *Westminster*, Salk. MSS. and see *Onslow's Nisi Prius* 185. On the trial of this cause, Lord Chief Justice *Holt* quoted the case of *Hopkins and Young* in *B. R.* wherein on a special verdict it was adjudged, that if a person served seven years, to any one exercising a trade, though that person had no right to use such trade, yet the defendant's having been employed in it seven years, it is a good service, even though he were *not* indentured. He also observed that if a woman marry a tradesman, and be employed in his business seven years, she may use that trade after his death: and also, if she marry a second husband, she may continue to exercise such trade, and if she die, her second husband may then continue to exercise it after, provided he were employed in it seven years in his wife's life time. He had mentioned all these opinions to the rest of the judges, and they all concurred.

Upon the whole it appears, that if a man have followed a trade seven years as master, apprentice, or journeyman, he cannot be sued upon this statute: and though the plaintiff in this action recover a verdict, he is *not entitled to any costs*; yet if the verdict be against him, he must pay costs; and the statute does in no case extend to journeymen, indeed if it did it would be of little use, for few of them have any money to supply informers with.

Note. The action is a "*qui tam*."

3. *Rec.*

3. *Remarks on the Impolicy of this Statute.*

That there are many laws which disgrace our statute book, is no new proposition: but perhaps there is hardly one so disgraceful to us as a trading nation, as the one under our present consideration. As a proof of this, the courts have always been extremely diffident in putting it into execution: but what most surprises me is, that the legislature do not repeal it entirely: for surely it never had its rise in *the principles of the English constitution, by which every man has a right to exercise his talents or his fortune, in the way most conducive to his own interest, honour and advantage.* Consequently, no legislature under heaven can determine what any individual may be fit for; nor can any legislators make him what they wish, any more than a farmer can grow what he likes in his ground; for the produce of the soil does not depend on the will of the cultivator, but on the supreme will of heaven, that has created certain earth, and certain clime for certain seed. The skilful farmer therefore will always consider what best suits his land. And thus it is with man's abilities, which can only be known by being brought into action. For as to any particular employment a man may follow, he will gain business in it only as he executes his work, he will gain in proportion as it is to the benefit of others to deal with him, for out of mutual interest proceeds mutual satisfaction. So that there appears to me a kind of self physic, that will ever cure people following the employment they are unfit for, without harassing the subject with those pests of society, "informers." Besides, suppose a man fail in one employment, is he on that account to starve, by being prevented taking to another? or on the contrary, suppose him to succeed in one employment, will any man in his senses attempt to draw the

the inference, that because he succeeded in one, he must fail in another? Such an inference surely would be a very absurd one. It is certainly most probable, that he who had sufficient address and ability to comport him well in one line, would be too prudent not to select another branch, in which he might succeed in like manner, having occasion to alter his situation in life.

This statute therefore seems to me to be rather founded on that law of *China*, which compels every man to continue in his employment, and transmit it to his children; or like that of the *savages of Otaheite*, whereby if a man be not born a chief, neither virtue, nor talents, nor merit, nor fortune can qualify him. But this is quite contrary to the principles of the *English constitution*, whereby the lowest subject may be advanced to the highest honours in the state.

“Laws, says the president *Montesquieu*, which oblige men to continue in their employments and transmit them to their children, are only calculated for arbitrary countries, where no one either can, or ought to have emulation.” But in a free country, every man should be permitted to follow that employment, which his own genius and the circumstances of things seem to direct to his advantage. It is upon this principle, that a free nation must ever produce the most ingenious mechanics, the most able merchants, the most expert anatomists, the most skilful physicians, the most accute lawyers, and the most pious divines; in a word, the most profound philosophers, the best bred and most accomplished gentlemen.

ARBITRATION.

This peaceable mode of settling disputes is effected thus, the parties first enter into a bond or agreement,

ment, to abide the award of usually two other persons, one named by each; and that their submission to such arbitration may be made a rule of any one of his majesty's courts of record, according to stat. 9 and 10 of *W. III. c. 15*.

When the arbitrators have made their award, if the losing party refuse to submit to it, one of the courts (but if any particular court be named in the bond or agreement, then that) must be moved to make the submission a rule of court, upon an affidavit made by a witness to the bond or agreement; and the rule being granted, (2) a copy thereof must be served on the adverse party, and the party entitled to the benefit of the award, ought to make a demand thereof; and in case of refusal, affidavit being thereof made, mentioning when and where such demand was made, the court may be then moved, "for an attachment *for not complying with the award.*"

But if the award have been partially or illegally made, the party aggrieved may move to set it aside; but in such case, the court will not go into the whole merits of the business, but only take into consideration such things as appear upon the face of it, and such as go to the misbehaviour of the arbitrators. 3 *Aik.* 2 *Bur.* 701. (3)

Note. It is a very good way for the arbitrators before they proceed to business, to choose some third person to be umpire, to sit along with them and settle all differences between them as they proceed; indeed it should be made a condition at first, for it is owing to the neglect of this, that arbitrations are frequently so long ere they are decided; and what is so beneficial to all parties, can be objected to by none, though no doubt after all, the mode of trying things in courts of law, would be

(2) When upon a trial, the matter is referred to arbitration, an order of *nisi prius* is drawn up.

(3) Any application to the court to set aside an award should be made without delay.

preferable to any mode of decision yet found out, were it not for the heavy expence attending it, which arises only out of the prolixity of the practice and the intricacies of special pleading.

ATTACHMENT.

This is the mode of proceeding against persons for contempt, as a witness for instance for not appearing to his subpcena, or an attorney to compel him to answer some charge made against him of unfair practice, or as we have already observed against any person for not complying with the terms of an award; and the moment an attachment is granted, the prosecution becomes of a *criminal* nature.

The method of obtaining an attachment is, thus, 1st. A rule to shew cause is moved for, grounded upon an affidavit of certain facts, to authorise the court to grant this rule *nisi*, when the party complained against has an opportunity within the time therein mentioned to shew some cause, wherefore the attachment ought not to issue, which if he cannot do to the satisfaction of the court, it is ordered to issue by the rule being made absolute. (4)

2. *Proceedings after the rule.*

First the writ issues, when the defendant must either stand committed, or put in bail to answer upon oath certain interrogatories, to be afterwards administered to him for the better information of the court.

These interrogatories are analogous to the declaration in other cases, or more properly speaking, they are similar to the interrogating part of a bill in

(4) Analogous to this, are all motions for *mandamuses*, informations, &c.

equity;

equity; they must be exhibited within the first four days after the return of the writ: and if any interrogatory be improper, the defendant may move the court for the prosecutor to shew cause why it should not be struck out.

With regard to the defendant's answers to the interrogatories exhibited, and not objected against; if he can clear himself he is discharged; if not, he is punished accordingly (5): and if perjured, may be prosecuted for that crime.

ATTORNIES.

2. *Of proceedings by them.*

An attorney may sue by attachment of privilege, instead of another writ, in other respects the proceedings are much the same as in other cases; but if, before his admission, he sue out a common writ to save the statute of limitations, a writ of privilege is not a continuation of it, and therefore the proceedings may be set aside for irregularity (6).

Of Proceedings against them for Debts.

When an attorney owes money, he cannot be arrested like another person; but a bill must be filed against him in the first instance, which is in the nature of a declaration (7), although the first process; after which the action proceeds, as in other cases.

3. *The*

(5) Usually fine or imprisonment, but sometimes both.

(6) *Smith, one, &c. against Bower, T. 30 G. 3.*

(7) This bill is engrossed on a treble penny stamped parchment, and in the *King's Bench* filed with the clerk of the declarations;

3. *The like for unfair Dealing towards their Clients.*

The former case is the nature of suing an attorney in his individual capacity as a citizen, as if he contract debts with tradesmen, &c. but what we shall now treat of, is the mode of proceeding against him for mal-practices in his profession, and this is summary.

It may be either by motion for a rule to shew cause why an attachment should not issue against him, or why he should not be struck off the roll; in both cases the application must be grounded upon affidavit of those facts, which are designed to induce the court to grant the rule *nisi*; and unless the attorney, by another affidavit, contradict that of the party complaining against him to the satisfaction of the court, the rule is made absolute (8).

4. *How to make an Attorney deliver his Bill.*

This is a difficulty which often occurs to a client; the mode of overcoming it is as follows:

First, the client must employ *another attorney*, who takes out a judge's summons (9) to compel the first to deliver his bill; at which time the client, or his fresh attorney for him, must sign the judge's book, engaging to pay what may appear due after taxation;

ration; and a copy also on a treble penny stamped *paper*, is delivered to the defendant, with notice to plead as in other cases. But in *C. P.* the defendant is not served with a copy of the bill, but only a notice that it is filed with the prothonotary, and that unless he appear he will be fore-judged, *i. e.* struck off the roll. But before the bill is filed, the defendant should be called by the crier in court.

(8) See Attachment.

(9) The summons must be in the name of some cause in which the attorney has been concerned.

and

and on the contrary, the original attorney is bound to refund what he has been overpaid; but he is not obliged to attend till the third summons, and of each a copy must be served on him, the original remaining with the new attorney.

After the third summons the judge will grant an order (10).

If he still disobey, notwithstanding the issuing of the order, then, upon affidavit of the service of copies of the three summonses and order, motion may be made to have the order made a rule of court, to do which leave is granted of course; and a copy of the rule being served in like manner, and affidavit thereof made, the court may be then moved for a rule to shew cause, why an attachment should not issue against him for contempt; when he becomes chargeable with the costs of this, and all subsequent proceedings against him, whether he afterwards comply with the request of his client or not; for the disobedience to the rule is an insult to the court.

The bill being delivered, the fresh attorney must then take out a summons in like manner as before, that the bill may be referred to the master for taxation in *B. R.* or to the prothonotary in *C. P.* who grants an appointment for that purpose (11); and if upon taxation the bill be reduced one sixth, the attorney pays the costs, commencing with the first summons; but if the reduction of the bill be less than a sixth, then the *client* has the costs to pay (12).

(10) If the summons be only to shew cause why the bill already delivered should not be referred for taxation, the attorney may notwithstanding bring his action for the same, for proceedings are not stayed "until the order issue."

(11) Till now three appointments; but this present Easter Term a rule commences, that if the party do not attend, the master may proceed *ex parte* the first time; but this is only in *B. R.*

(12) But herein the master or prothonotary has a discretion.

Taxation

214 ALPHABETICAL CHAPTER.

Taxation being over, the party in whose behalf the balance appears to be, whether attorney or client, may then move the court for an attachment for non-payment of the same; or take his other remedy, *i. e.* by action in the usual way, as for the recovery of another debt. 2 G. c. 23. s. 23.

5. *Bills delivered without Compulsion.*

No attorney can bring an action to recover the amount of his bill, until one month after the delivery of the same, signed with his name. This time is allowed, that the client may have leisure to look into the charges.

And if an action be commenced, though even after the month, the court upon being specially moved, will most commonly, *even then*, refer the bill to be taxed; but this in a great measure depends on the circumstances of the case.

Note. Bills between one solicitor and another, and those for conveyancing cannot be taxed, unless indeed that the conveyancing be blended in a bill with common law.

6. *Attornies keeping their Client's Money,*

It frequently happens, that a man employs an attorney to arrest his debtor, or serve him with a copy of a writ, and that the debt and costs are directly, or, however, very soon after paid; but notwithstanding which, the creditor is as distant from the receipt of his money as before; in such case the court may be moved, *upon an affidavit of these facts*, for a rule to shew cause why the attorney should not be struck off the roll.

Note. Here let it be observed, that a distinction ought always to be taken, between the case of the client having an account standing

standing with his attorney, upon the balance of which something may be due to him, or something due to the attorney; the solution of which doubt can only appear by a statement of accounts (13); and the case wherein nothing can be due to the attorney at all, or at the utmost a letter or two, which, if so, the client should admit it in his application; so that it may clearly and unequivocally appear to the court, that *the attorney has wilfully detained his client's money.*

BANKRUPT.

1. *Arrest anterior to his obtaining his Certificate.*

A BANKRUPT cannot be arrested till forty-two days after his actual surrender, or such further time as he may be allowed to finish his examination, (unless he be in custody at the time of such surrender); therefore, if arrested, he need only produce the summons, signed by the commissioners or assignees, and give the officer a copy thereof; and if he be detained he may recover 5*l.* a day. *Stat. 5 G. 2. c. 30.*

2. *But being certificated.*

If the debt were due antecedently, upon which he is then arrested; or if being in custody upon an anterior debt he be detained, he may direct his attorney to take out a judge's summons to shew cause, *why he should not be discharged upon filing common bail.*

To support his case before the judge, the certificate must be then produced, accompanied with an affidavit that he is the person therein named, and

(13) In such case therefore the first proceeding should be, to compel the attorney to deliver his bill.

that

216 ALPHABETICAL CHAPTER.

that the debt accrued before he became a bankrupt (14); when the judge will make an order for his discharge (15) accordingly. See 5 G. II. c. 30. s. 13.

Note. But there is an exception to the above rule; for if the bankrupt be in custody *at* King, or on extent, he cannot be discharged. 1 *Atkins*, 220.

2. *Assignees.*

When the assignees of a bankrupt bring an action, they must prove on the trial of the cause,

1st. That the bankrupt was a trader (16).

2d. Being so, he committed an act of bankruptcy (17).

3d. That

(14) This means before the commission of the act of bankruptcy.

(15) In like manner as the bankrupt himself may be thus discharged, so may any persons who are bail for him, either upon an arrest subsequent or prior to the certificate; the mode of doing which is, to apply for a judge's summons, that an *exoneretur* may be entered on the bail-piece; but this must be done before the return of the second *sci. fa.* if the first be returned *nihil*.

(16) It must not be the bankrupt's having bought a quantity of goods, merely that a commission might issue against him; for upon the face of it this appears fraudulent; but he must be proved actually a buyer and seller of certain goods, in such quantity as to make him a *bona fide* trader, capable of contracting debt to such an amount as ought to entitle a man, *on failure*, to the benefit of the bankrupt laws,

(17) The first and most usual of which is that of being denied to a creditor, *being in the house at the same time*; but the servant or other person so denying the trader, must have been required by him so to do, if particular persons call, or if he required his servants to deny him generally on account of his debts, this includes creditors of course; or 2dly, *going out*, in order to be purposely absent when a creditor called; or 3dly, procuring himself willingly to be arrested; 4thly, procuring his goods to be

3d. That the commission issued regularly.

4th. That they were appointed assignees; and

5th. The assignment of the bankrupt's effects to them by the commissioners.

And their representative character being thus established, the like proofs are further required, as in other cases.

The bankrupt himself may be an evidence, provided he have released his assignees of his interest in the effects; which every one knows is in proportion to the dividend; for if 10s. in the pound, he is allowed 5*l.* per cent. and if 12s. 6*d.* then 7*l.* 10s. per cent. but if 15s. then 10*l.* per cent. provided that such allowance do not in the first case amount to 200*l.* in the second to 250*l.* and in the third to 300*l.* (18)

Note. If under 10s. in the pound, then the commissioners may allow him a sum according to their discretion, not exceeding 3 per cent.

In order therefore to qualify the bankrupt to give his evidence, if the matter be worth while, the as-

be attached; 5thly, making a fraudulent conveyance of an estate to a friend, or secret trustee; 6thly, lying in prison two months or more upon an arrest; 7thly, escaping from prison after an arrest for a just debt, amounting to 100*l.* 8thly, or neglecting to make satisfaction for any just debt, to the amount of 100*l.* within two months after service of legal process; but in this last case the trader must have privilege of parliament. These are the principal acts of bankruptcy that occur. See *Blackst. Com.* II. 478. But to which it is necessary to add one other, namely, that of a tradesman's being denied by express order to the holder of a bill which is due, notwithstanding that he afterwards pays that bill. 2 Term Rep. 59. *Onslow's Nisi Prius*, 37.

Note. This principle is to be collected, "that in all cases of denial, it must be with an intent to defraud creditors."

(18) *Blackst. Com.* II. 483.

signees

assignees may pay him any of those sums to which he may be entitled, and take a release from him; and he may then be subpoenaed like another witness; or indeed the bankrupt, if he please, may relinquish his claim. But if he have been a bankrupt before, then, *unless he pay full 15 s. in the pound (19)*, although his certificate liberates his person, *yet his future effects remain liable*. To qualify him therefore for an evidence in this case, it is right that all his creditors should release him as to any claim that they may have upon his future estate. The like holds if he have compounded with his creditors, or have been relieved by an act of insolvency, at any anterior time; for then the bankruptcy is deemed in the nature of a second one, it being indeed a second failure.

3. *Creditor.*

A creditor may, in like manner, by releasing the assignees of his debt, be examined as a witness; but one creditor ought not to be paid before another on this account.

4. *Proving Costs of Suit under the Commission.*

No creditor can prove costs of suit under the commission, until he have obtained final judgment, and then he is at liberty so to do; but if the action be bailable, he thereby exonerates the bail (20).

(19) Stat. 5. G. II. c.30.

(20) 2 B. Rep. 1317.

5. *Executor.*

5. *Executor.*

If a bankrupt be an executor, the commissioners cannot seize the effects of his testator, not even in money, which cannot be specifically distinguished (21).

BILL of EXCHANGE. *See* Promissory Note.

BARON and FEME. *See* Husband and Wife.

CLAUSUM FREGIT. *See* Original.

COMPOUNDING ACTIONS. *See* Informer.

CONSTABLES. *See* Justices of the Peace.

C O R P O R A T I O N.

CORPORATIONS may sue in their corporate capacity, by attorney appointed under their common seal; and they may proceed like other persons: but in suits against them, an original must be the first proceeding, and the summons issuing thereon must be left with the clerk of the corporation. For the rest of the proceedings, see *Peers*, &c.

(21) 3 *Burr.* 1369.

COSTS.

In order to demonstrate in what cases a plaintiff or defendant is entitled to his costs, we shall divide verdicts given by juries into two kinds, *viz.* those amounting to forty shillings or more, and those under forty shillings

1. *Verdict* (22) *must be forty shillings* (23) or more to carry costs in the following cases, (unless the judge certify) 1st. In trespass (24) relative to the freehold, or things thereto affixed. 2d. In actions of assault and battery. (25) 3d. In defamation, (26) by stat. 21 *Jac. c.* 16. 4th. In all actions of debt. (27)

Note. But in trespass committed by an unqualified tradesman or apprentice, any damages, however small, carry costs, 4 & 5 *W. & M.*

(22) A distinction should be taken between verdict and damages on inquisition, for in this latter case, any damages however small carry costs.

(23) If less than forty shillings, each party pays his own costs.

(24) But in trespass and for impounding cattle the defendant must be found guilty of the impounding.

(25) There is an artful trick to evade this wholesome provision of the legislature; commonly made use of by the lower order of attorneys of putting a distinct count in the declaration, "for tearing cloaths," because if the jury find for the defendant upon this count, any damages, however small, carry costs; but if the jury find, *the tearing was in consequence of the beating*, then each party must pay his own costs unless forty shillings be given. 1 *Term Rep.* 655.

(26) This statute by the express letter of it *extends* to damages assessed on writs of inquiry, but in such case the words must be *actionable in themselves*, therefore, if the defamation be *per quod*, it is otherwise.

(27) And in assumpsit, if the original debt did not amount to forty shillings, provided the defendant were an inhabitant of either the city of *London*, or county of *Middlesex*, at the time of com-

2. *Of Verdicts under Forty Shillings.*

Nothing need be observed under this head, but that in all actions whatsoever, wherein the verdict is less than forty shillings, still the defendant pays the plaintiff his costs, *except in the cases above enumerated*, and unless the judge certify; but no injury merely consequential to the trespass carries costs, unless the damages be 40s.

3. *Of the Judge's Certificate.*

This must be applied for *at nisi prius*, directly after verdict; and in the granting it, the judge has his discretion. The purport may be either to *abridge* the plaintiff of his costs, or to *allow* him his

commencing the action, so that he was liable in the one instance to be summoned to the court of requests for the city, or in the other case to the county court; he may apply the term after verdict, to the court upon his own affidavit, containing the necessary facts for a rule to shew cause why a suggestion should not be entered upon record, according to the statute 3 Jac. I. (with respect to *London*,) or pursuant to stat. 23 G. II. (with respect to *Middlesex*.) This rule being made absolute, the costs of the application will be allowed to the defendant, together with his costs in defending the action, because he ought to have been summoned as above.

See Suggestion under its proper title.

Note 1. But with regard to the *Westminster* and most of the other acts, they must be pleaded.

Note 2. A set-off reducing the demand to less than forty shillings, does not affect the jurisdiction; but payments given in evidence under the general issue, reducing the debt under forty shillings, will entitle the plaintiff to enter his suggestion as above. *Set Set Off.*

Note 3. But if defendant suffer judgment to go by default, he cannot have the benefit of such suggestion, nor if the judge certify.

costs.

costs. First therefore, we shall treat of the certificate under the 43d *Elizabeth*, c. 6. Whereby in all personal actions whatsoever, (not being for any title or interest in lands, nor concerning the freehold or inheritance of any lands,) if the judge certify that the debt or damages recovered do not amount to forty shillings, the plaintiff can recover no more costs than damages. Secondly, under 22 and 23 of *Car. II.* c. 9. in actions of assault and battery, the judge, if the verdict be under forty shillings, may certify that an assault and battery were sufficiently proved, and the plaintiff will then be entitled to his full costs. And the like in an action of trespass, if the judge certify that the title of the land came chiefly in question.

And thirdly, by 8 and 9 of *W. c. II.* If the judge certify the trespass to be wilful and malicious, the plaintiff will be entitled to his full costs, although the jury find a verdict for a less sum than forty shillings. And 4thly, in causes tried by special juries, if the judge upon the back of the record certify, that the particular case required one, the losing party must pay the expense of it. See 3 *G. II.* c. 2. and 24 *G. 2. c. 18.*

4. Of Defendant's Costs.

Costs are allowed to defendants in the following cases.

- 1st. If the verdict be for defendant.
- 2d. If plaintiff be non-suited.
- 3d. If plaintiff discontinue, or do not declare in time.
- 4th. Upon judgment on demurrer.
- 5th. On judgment as in case of a non-suit for not proceeding to trial.
- 6th.

6th. Or for not executing a writ of inquiry pursuant to notice.

In short, in all cases of failure by the plaintiff, wherein had he succeeded, he would have been entitled to costs; the defendant is entitled to costs in like manner, and so *vice versa*, except as observed above. See *stat. 8. Eliz. c. 2. 4. Jac. I. c. 3. 13 Car. II. st. 2. c. 2. 8 and 9 W. III. c. 11. s. 1 and 2. 14 G. II. c. 17.*

CUSTOMS AND EXCISE.

1. Notice.

Before any one can sue an exciseman, custom-house officer, (28) or other person assisting one of them, he must give him notice in writing one month before the action is brought, which must contain these essentials.

1. The cause of action.
2. The name and place of abode of the person who is to be plaintiff.
3. Ditto of his attorney.

And no evidence can be given upon the trial, but respecting the matter contained in the notice: (29)

2. Tender of Amends.

And any time within the space of that month, the officer or his assistant may tender amends, either

(28) 28 G. III. c. 37.

(29) Then ought not the notice to serve as the declaration without any further expense?

to

to the plaintiff or is attorney ; and if not accepted the defendant may plead in bar, or pay the money into court before issue joined.

3. *Limitation of Action.*

The action must be brought within three calendar months after the cause of action arose, therefore the notice ought to be given without delay.

4. *Verdict for the Plaintiff.*

And if the action be brought for a seizure, though even the plaintiff recover a verdict, and no matter how great the sum, yet the judge may certify so as to prevent the plaintiff ever recovering more than *two-pence*, for by the 28th of the present king, c. 37. it being certified that there was probable cause, no greater damages can be recovered, nor can the plaintiff recover his costs, notwithstanding the judgment of his peers in his favour.

5. *Verdict for Defendant.*

But if the verdict be for the defendant, *the plaintiff is then liable to treble costs.*

6. *Venue.*

All actions brought against excise and custom-house officers, or their assistants are local.

EVIDENCE.

EVIDENCE is that which reduces the averments of the parties to moral certainty.

Every body knows it is of two kinds, *i. e.* written and parol. Of the former kind are three species, 1st. All records, public (30) acts of parliament, &c. whose very nature gives them authenticity of course; and 2dly. Deeds, which term comprehends all writings under seal; and 3dly. Agreements, promissory notes, and bills of exchange, in fine all writings signed *but* not sealed: these two last species are nearly alike, for being once proved, they contain their own evidence, as they need only be read to discover what they are; the mode of proving them if witnessed, is by a person who actually subscribed his, or her name, as a witness to the instrument; but if not witnessed, then it is sufficient to prove the signature by any person acquainted with the party's hand-writing; but similitude of hands, or comparing one hand-writing with another is no evidence. In those kinds of instruments, such as common agreements, notes of hand, &c. that do not in reality require a witness, people should be extremely careful *not* to have them witnessed; because if at any distance of time, an action be brought relative to such writing: upon the trial of the cause, no person can be permitted to prove the hand-writing, but the actual person who was a subscribing witness. And at this time perhaps, he may be three or four hundred miles off, a case indeed which often occurs; therefore at the costs of the party requiring his attendance, his expenses must be paid to *London*, or the assizes as the case may be; his

(30) Private acts must be pleaded.

Q

charges

charges *while* there, and the like *back* again; a matter which of itself frequently *doubles* the costs. It may be said, if the party recover a verdict in consequence, the expense of this witness being so far fetched, will not fall upon him, but upon his adversary, because he will be allowed it again on the taxation of his costs; but let it be recollected that this absurd *Galimatias* of, *you recover against him, and he recovers against another, and so on, is very far from payment of debt and costs.* A verdict may be recovered by a plaintiff, his full costs may be allowed by the master, but if the defendant run away, or if when taken in execution he should go to jail, in preference to satisfying the judgment; the expense of fetching this witness from a-far, must then inevitably fall upon the plaintiff, and this may arise not from the dishonesty of the defendant, for he may have property sufficient to pay the debt, and a few pounds over, but *not* to pay 60 or 70*l.* besides.

In short, every thing which tends unnecessarily to increase costs of suit, operates in *effect* like a fine upon a man for suing for his own. But it is a rule, that the law always requires the best evidence that can be had, yet certainly in *point of common sense* that need not be one particular kind; for if there be two kinds, one of equal goodness with the other, why not prefer that which is least expensive and most convenient? For instance, in the case under our consideration, of a witness to a deed, can any lawyer give me a sufficient reason, why an *affidavit* of the due execution thereof might not be as well made before a *magistrate* or commissioner, resident in the same *town* with the witness, as to put an honest creditor already sufficiently injured by being obliged to go to law to get his debt, to the charge of bringing a witness three or four hundred miles to answer a simple question, which if put to the *debtor himself*, he neither could nor would deny? And then to
maintain

maintain this witness in town, and send him the three or four hundred miles back again, is really purchasing a 'yes, or a no,' with a vengeance! I am not insensible that I shall be answered, the adverse party according to my plan, would not have the benefit of a cross examination. But pray what cross examination ninety-nine times in an hundred is necessary of a witness to a lease or bond; I might say nine hundred and ninety-nine times in a thousand; and when any is necessary, it can only be, where the instrument upon which the action is brought is suspected to be a forgery; or that the party having executed it, was under some undue influence at the time; this however may be easily obviated by the affidavit of the execution of the deed, &c. being filed at the time of the service of the declaration; of which let the *defendant* have notice, and if *he* suspect any fraud in the case, let him make oath of what that fraud is. If the hand-writing be forged let him declare it, but if it be truly his, do not let him disgrace himself by denying it. When a man has once given a note, he ought not to deny his signature; and the holder of it should have an easy mode of proving it, this would put paper credit on a much better footing than it is. A note or bill is an action confessed, and a man can have no defence to it, but that he has paid it, or that he never received a valuable consideration for it, or that in reality it is not his hand-writing. In the two first cases, the *onus probandi*, as the law stands at present, lies upon the defendant; why then put the plaintiff upon the proof of what the defendant ought not to deny? and if he do deny it, it is an allegation he himself ought to support, *common honesty* requires it.

Upon such affidavit, of whatever the fact may be, let him move the court to compel the plaintiff to have his witness *à nisi prius* to be examined; of the propriety of which the court would then judge from

the merits. Or the defendant, knowing the residence of such witness, if he do not choose to make such an affidavit, then let him subpoena the witness himself, and he will have every benefit of his cross examination that he could possibly wish. This would be breaking in upon an established rule of law; those who *live* by the *abuses* will tell you. But I desire to know whether that rule be established on reason and convenience? if it be, it ought not to be disturbed; but if it be not, it ought to be dispensed with.

The design of every inquest in a court of justice is to obtain truth, and if that can be had at a small expense, why put the parties to such a heavy one, as must needs considerable injure if not totally ruin one of them? Do not the *Courts of Equity* proceed entirely on evidence taken before examiners; in that case it may be urged, you have the opportunity of exhibiting cross interrogatories; but according to my plan, you would be still better off, for you would have an opportunity of really cross examining the witness in court; only you must first move upon reasonable ground, and indeed if there be no ground upon which you can move, you have no right to suspect the witness either perjured or mistaken, you have no right in such case to cross examine him at all.

Are not all records, evidence from their authenticity, why then should not the seal of every magistrate or commissioner in the country be of equal authenticity: or is it not far more reasonable that an affidavit of this nature should prove the handwriting of a note of hand, &c. than the plaintiff's own affidavit of a debt due to him by the defendant, which he may make without producing any one voucher whatever, and that to any amount he pleases to restrain a citizen from his personal liberty; and if the sum be larger than the defendant can find
bail

bail for, he may be kept for near a twelvemonth, in jail before his cause is decided, during which time, not only the unhappy man but perhaps his family also are robbed of support. I do not mean to plead the cause of defendants in particular, any more than that of plaintiffs; neither do I mean to plead the cause of clients, any more than that of lawyers, but to plead the cause of the public at large, by averring that every thing which tends to increase the expense attendant upon the decision of litigation, tends to increase the unhappiness of the people, as well individually as collectively. I cannot see my fellow creature in distress, but if I have a heart, like that which the Almighty designed to move in the human breast, if passions flow from it, or the blood return to it, I must feel for the misfortune of my common brother. Every body must admit that there is a considerable difference between a sum of money due upon a bond, a note of hand, or rent due upon a lease, and any other kind of action wherein the defendant has given no acknowledgment in writing. What is the distinction made by judge *Blackstone* between an action of debt, and an action of assumpsit, “the *one*, says this great man, is to compel a specific performance of the contract; but the *other*, is to recover damages for its non performance. (31)

Thus much however for those species of written evidence which must be supported by *parol* testimony, and of this nature are all registers of marriage, baptism, birth, &c. as they must not only be proved to be extracted from the parish books, but also *parol* testimony must be adduced to prove the identity of persons mentioned in those registers; but I would by no means have the rule just now proposed extended to parish registers, for they are very different in their natures, the actions in which

(31) See *Bl. Com.* 3. 157.

they are required being commonly those wherein large estates are depending, and therefore the expense is not so great in proportion, because of the value of the thing in dispute; and besides it is really necessary to have the witnesses in court, strictly to cross examine them as to the identity of persons. Indeed that is of more use than the registers themselves, particularly when they are of ancient date, and there are many of the same name in the book.

But to return to contrasts in writing, I believe it would be found by experience that very few persons would incur the risk of exhibiting false notes or deeds in any civil actions, because instead of recovering upon such instruments, they would bring upon themselves that prosecution which would end in the forfeiture of life, as the detection would be almost certain. For there is an amazing difference to be taken between a man who presents himself at a banker's, where the true owner of a bill is seldom known; but the only caution is the particular size and engraving of the check of the house, the handwriting of the drawer, and his having effects with the banker to the amount of the draft. And yet upon the whole, even in that respect, considering the vast commerce of this kingdom, the forgeries are really few in proportion. This may partly arise from the laudable vigilance used in the detection of persons committing this horrid crime, the never failing prosecution, and the almost certainty of punishment succeeding a conviction; but the chances of the escape of any one bringing an action on a bill knowing the same to be forged, would yet be considerably diminished.

2. *Viva Voce Evidence.*

We shall now treat of *viva voce* evidence, or the manner of examining witnesses in open court, which naturally

naturally ranks itself under two heads, first competency, and secondly credit.

When a witness thereof presents himself to be examined, the first consideration is, whether he be interested or not, as it is on this principle that this general rule is founded, 'that no man can be a witness in his own cause,' and therefore it matters not, whether a witness have an interest in the damages to be recovered, or whether he be liable to pay the attorney his bill, for in all cases (a few only excepted) (32) an *interested* witness is *incompetent*.

3. *Credibility.*

But the competency of a witness being once established, the next thing is his credibility; and were I to write for seven years, or quote all the lawyers from the time of Sir *Edward Coke* up to the present day, I could not possibly collect better rules than the four following of the celebrated Baron *Wolfsius*, for the cases I could collect would be but the capillary vessels, of which these rules form the *grand trunk*.

1st. That he who testifies a thing be capable of knowing it *thoroughly*, so as *not* to deceive himself.

3d. That he relate the affair as he knows it, and have formed *no purpose* to deceive, in a word, "that he be prudent and upright."

3d. Whether the witness were *present* at the transaction.

4th. If he were present, did he pay sufficient *attention* to *qualify* himself for a reporter.

(32) See *Hue and Cry*.

4. *Hearsay*

4. *Hearsay Evidence.*

When witnesses are examined in court, they must not relate what they believe of things, because they may be mistaken in that belief, for which reason they can be allowed to give nothing in evidence as to their belief, but they must speak as to their absolute knowledge, or not at all. It is not sufficient for a person to assert what he has been told, for he may have been told a falsehood, though any thing which has been told a witness by the *plaintiff*, may be evidence against the *plaintiff*; or *vice versa*, what has been asserted by the *defendant*, may be equally given in evidence against *him*, unless indeed it be any thing which had passed between the parties in the road to a *compromise*; for to divulge matters of this kind, would be a breach of good faith. But where the question in issue is relative to the *legitimacy* of a person, it is usual to admit as evidence what the parents have been heard to say, relative to their being or not being married; (33) for the presumption arising from the cohabitation, is either strengthened or destroyed by such declarations. In short, the reputation of the parents' *cobabiting as man and wife*, seems to be good evidence of the legitimacy of the offspring, without any marriage register being produced, *because* it is as good evidence as can be expected of the children.

So hearsay is good evidence to prove who was a man's grandfather when he married, what children he had and the like, for it would be unreasonable to presume that better evidence could be had. So to prove the death of any one's father or other rela-

(33) But a woman cannot be admitted to prove the non access of her husband, for this would be proving her own infamy.

tion,

tion, the common reputation and belief of it in the family is evidence, to be received of the fact. But in an action for *criminal conversation*, a marriage in fact *must* be proved, or the plaintiff must be nonsuited, though generally in other cases, reputation and cohabitation are sufficient evidence of marriage. (34)

So, evidence that a man has not been heard of for many years, is *prima facie* evidence of his death, so as to put the opposite party upon proof of his being yet alive, for many persons go to the *East* and *West Indies* and are never heard of more. In the mean time, what is done upon such trial, is no injury to the person so deemed to have been dead, if he or his issue afterwards appear and claim the estate. (35)

The ground therefore upon which hearsay evidence is ever permitted, is agreeable to this universal rule, "that if it be the best evidence the nature of the thing admits of, it ought to be received." But to illustrate this point, we shall just take notice of the case of *May v. May*, in *K. B. Hil. T. 17th G. II.* which was a trial at bar, upon an issue out of *Chancery* respecting the plaintiff's legitimacy. The preamble of an act of parliament recited, that the plaintiff's father was not married, and to the truth of which he was proved to have been sworn; but upon proof of a constant cohabitation, and his owning her upon all other occasions for his wife, the plaintiff obtained a verdict. (36)

In questions of prescription too, as where the issue is about a right of way, hearsay is good evidence. (37)

(34) *Black. Com.* Vol. III. 140.

(35) *Black. Rep.* 404.

(36) See *Onslow's Nisi Pri.* 105.

(37) *Theory of Evid.* 111 and 112.

5. *How to know what Evidence is necessary in any particular Case.*

To know this nothing more is necessary than to examine the matter in issue between the parties; and to the proper understanding of which it is necessary, after having perused the declaration, to examine the plea, and see whether it deny the whole, or a part only of the plaintiff's averments. If it deny the whole, *i. e.* if it be the general issue to the action, then the plaintiff must prove all his averments; but if it be only a special negative, then that or those facts which it so denies are only in issue, the rest being taken for granted.

6. *Of the Manner of proceeding against Witnesses for not obeying their Subpœnas.*

Of the mode of subpœnaing witnesses we have already treated in the first part of this work; therefore as to the method of proceeding against them for not appearing, let it be observed, that at the trial they must be called upon their subpœnas in open court: and in case they do not answer, you have two remedies against them; the one by an action for damages, the other by attachment. In the latter case you move upon affidavit (38) for a rule to shew cause why an attachment should not issue against the person having made such default. But then this affidavit must contain these facts: 1st. That a subpœna regularly issued in the cause. 2d. That a copy of the same was personally served on the witness by the deponent, who at the same time shewed him the original. 3d. That a sufficient sum, according to

(38) See Attachment.

the calling of the witness, was tendered to him at the time, to defray his expences to *London* or the assizes, as the case may be, maintain him while there, and pay his expences returning home. 4th. That the copy of the said subpoena was served upon him early enough, that he might have sufficient time to appear at the trial, without setting off at a moment's warning (39). 5th. That upon the trial he did not appear. 6th. Though called upon his subpoena. 7th. The injury which the party conceives he has suffered by his non-attendance.

Or if the party prefer suing the person subpoenaed in an action for damages, such action must be brought upon the stat. of the 5th *Eliz. c. 9. s. 12.* but the same evidence is required upon the trial of the cause as must be otherwise sworn in the affidavit. And it may be taken as an invariable rule, not only in this, but in every other case, that the same matters as it would be necessary to prove, supposing a cause were an issue to be tried by a jury, are equally necessary when a double, or I should rather say an alternative prosecution is allowed to be sworn in an affidavit to obtain the rule; and so *vice versa*.

EXECUTION.

A person cannot be taken in execution on a Sunday for a penalty recovered on the lottery act; that being no constructive breach of the peace. Nor on an attachment for non-payment of costs, because it is in the nature of a civil execution. The like holds

(39) Service upon a witness in the city at two o'clock in the afternoon, to attend at the sittings at *Westminster* that evening, was deemed too short a notice. 1 *Strangs*, 510.

with

with regard to attachment for non-performance of an award. *Rex v. Myers*, E. 26 G. 3.

FEIGNED ISSUE.

A feigned issue is a question of fact, sent from the court of *Chancery*, or equity side of the *Exchequer*, to a court of law, to be tried by a jury. In like manner too, do the courts of equity send questions of law to be determined by the judges; and in either case the proceedings are similar to those in any other common action of the like species.

HABEAS CORPUS.

1. *Of the Grand Writ.*

THERE are various species of this writ; but the grand writ of *Habeas Corpus*, which is to bring up the body of a person illegally committed to jail, so that he may be discharged, is obtained by moving the court of K. B. (40) for a rule to shew cause (41) why a writ of *habeas corpus* should not issue in a certain case. This motion must be grounded upon an affidavit of the fact of the prisoner's detention, to which must be annexed a copy of the warrant of his commitment; or if it hath been refused, the affidavit should state that fact. The court usually make the rule absolute in the first

(40) C. P. has the like power of granting it.

(41) Though in vacation application may be made to a judge at chambers.

instance,

instance, and determine the merits upon the return of the *habeas corpus* (42), when the prisoner is brought up, and either discharged or remanded as the judges think fit.

2. Of the Removal of Prisoners.

The second species of *habeas corpus* is that to remove the body of a prisoner from the custody of the sheriff to that of the marshal of the *King's Bench*; in other words it is to remove him from *Newgate*, or any other county jail, to the *King's Bench Prison* (43); or to prevent him going from a spunging-house to a county jail; in either case the writ is the same.

As to the mode of suing it out, it is bought at the stationers; you then fill up the blanks, and proceed as in similar cases; lastly getting it returned at the sheriff's office. This *habeas corpus* is commonly

(42) The return to a *habeas corpus* is the answer of the party to whom the writ is directed to the charges therein contained against him. As for example: some excuse for detaining the person, therein named, in his custody; as in the case of a seaman, for instance, "that he was impressed by virtue of the proper warrant of the admiralty." Now this return is in the nature of a declaration, and may be pleaded or demurred to in like manner; and the liberty of the party detained in custody depends wholly upon the decision of the issue. Of the like nature are returns to *mandamuses*, and other writs of a similar kind.

(43) This is supposing the defendant to be arrested on a *King's Bench* writ; for if the writ be a *C. P.* one, he must then be removed to the Fleet; but if he wish to go to the *K. B.* in preference, he must get some creditor to make affidavit of his debt being 10*l.* or upwards; and thereon a *King's Bench* writ may be obtained, and left at the sheriff's office with the *habeas corpus*.

But if defendant be in custody in an inferior jurisdiction, as the sheriff's court in *London*, then he may have a *habeas corpus* in the first instance, without any additional writ issuing in the court above.

called

238 ALPHABETICAL CHAPTER.

called *ad faciendum et recipiendum*, consequently there needs neither motion in court, nor application to a judge; this being only necessary in the grand writ of which we first treated.

Note. Any of the judges have power to commit the defendant, but if he be removed from the country, the sheriff must be first paid a shilling a mile.

3. *Of the Removal of a Cause from an inferior Jurisdiction.*

This must be done before issue or demurrer joined in the court *below*; and when the debt is under 10*l.* bail must be given, *first*, in the inferior jurisdiction, who must enter into recognizance, *not as in other cases to surrender the defendant's person, but absolutely to pay the debt and costs*, if he fail in the suit; otherwise the judge will not allow the writ; and two days previous notice must be given to the plaintiff's attorney, of the residence of the bail, that he may enquire concerning them.

4. *Of Bail in the Court above.*

The other bail (44) must be put in in the court above; for which purpose the plaintiff's attorney must apply to a judge for a rule: if in term it is a four day one, but if in vacation it is an eight day one; a copy of which he must serve on the defendant's attorney, (45); and thereon, if the defendant fail to comply with the condition, the plaintiff may issue a *procedendo*, which returns the cause whence it came.

(44) This is like bail above in other cases, being given only to insure the defendant's surrendering himself.

(45) Defendant must get the *habeas corpus* returned before he can put in his bail.

The

The time for excepting to the bail is within 28 days, and they may be compelled to justify as in other cases: in short, after what has been already observed, the reader who has read the first book of this work will need no further information, as therein, under the article *Bail*, he may collect every necessary instruction, either directly or by analogy.

5. *Of the further Proceedings.*

Habeas corpus differs from *certiorari*, because by the latter the suit from the court below is continued in the court above; but by the former, the proceedings are all *de novo*; therefore the plaintiff must declare again, which he may either do *de bene esse*, or in chief; but then the plaintiff is confined to two terms, as the defendant is not bound to plead (46) if delivered later. The *venue*, although the action be a transitory one, must yet be laid in the county wherein the court below is situate; and the benefit of non-prossing the plaintiff for any omission is taken away. These are the leading distinctions between causes removed to, and those originally commenced in, a superior court; the rest of the proceedings being as in ordinary.

6. *Of the Habeas ad testificandum.*

This is neither more nor less than a *subpoena*, to have the benefit of the testimony of a person detained in some jail, the writ being directed to the keeper thereof; but this species of *habeas* cannot be

(46) The time for pleading is four days after the delivery of the declaration, when the defendant resides in *London*, or within 20 miles of it; but if his residence be above that distance, then eight days; and no imparlance can be allowed him, even though the declaration be not delivered the same term wherein the cause was removed.

sued

sued out at the pleasure of the party requiring it, unless an affidavit be previously sworn before some judge, of the prisoner's being a material witness, who will then grant his *fiat* for the writ; which being afterwards left with the marshal, warden, &c. he causes the witness to be brought up at the time required.

7. *Of the Habeas ad satisfaciendum.*

This species is used to bring up a prisoner to receive judgment, or be charged in execution, in one court, having previously removed himself, by means of his being sued in some other cause, to the prison of some other court. It is made returnable on the day it is intended he should be committed; in short, this species is analogous to an execution in other cases.

H U N D R E D.

1. *Of the Nature of the Action.*

This action is upon the statute of hue and cry, and only extends to highway (47) robberies committed in the day time (48); but travelling on a Sunday (49) is not within the provision of this law, yet going to church is. The nature of the robbery is judged of by its commencement; for though the actual taking were in a house, yet if the plaintiff were first assaulted

(47) No matter whether public or private.

(48) If there be light enough to discern a man's countenance, whether before or after sun-set, it is deemed day in law.

(49) *Morg. Vad. Mec. V. II. 13.*

on

on the highway, and then taken to this house, this latter circumstance makes no odds (50).

2. Of the notice.

This action cannot be sustained, unless the party robbed do, as soon as convenient, give notice to (51) an inhabitant of some town near the place, in pursuance of stat. 27 *Elix. c. 13. p. 2.*; but there is a second notice required as well, by the 8th of *Geo. II. c. 16.* which with all convenient speed must be given to some *constable*, borougher, headborough, or tything-man of some town or place near where the robbery was committed; and this last notice must be in writing, though it need not be personally served; if left at the officer's house it is sufficient.

(50) *Morg. Vad. Mec.* Vol. II. p. 13.

(51) The common and most proper way is to give notice at the first inn in the next town, and then proceed to the nearest magistrate (1), who will take the allegation of the party robbed on oath (2), according to the statute, and bind him, her, or them over to prosecute.

(1) Of the county in which the robbery was committed.

(2) *Morgan*, in his *Vade Mecum*, V. II. p. 25. states that it has been held by three judges against one, that the party swearing he did not know the robbers, without adding, "nor any of them," is fatal; because not pursuant to the statute. I myself, however, think the opinion of the one judge by far the most liberal and proper; for the moral obligation is in the sense, not in the words of the oath.

3. *Of the Contents of the Notice.*

It should mention, *as far as the nature of the case will admit*, the number of felons who committed the robbery, the description of their persons, with the time and place. It is as well to take care too, that the notice be given to a constable of the same hundred; and in addition to this, notice must also be advertised in the *London Gazette*, describing the robbers and circumstances in like manner; and the one notice, in point of *substance*, ought to accord with the other.

4. *The plaintiff must give Security for the Costs.*

Before the action is commenced, the plaintiff must enter into a bond before the chief clerk, secondary, or filacer of the county; or before the clerk of the pleas of the court wherein the action is intended to be brought; or before the sheriff of the county (52); in the penalty of 100*l.* with two sufficient sureties, to be approved of by such proper officer or his deputy; to secure the high constable, *against whom the action may be brought*; his costs to be taxed by the master.

(52) If this bond be entered into before the sheriff, he must transmit it to the proper officer of the court, by certificate in writing, *in the nature of a return*, before the writ is sued out; and the party must see to get this done, and deliver the bond to the proper officer of the court. Indeed in actions of this nature, as in all others, but in cases of this kind in particular, it is always matter of practical reflection, whether any other particular be necessary or not, but principally so before actions of this sort are commenced; as the smallest omission on trial may prove the cause of a non-suit.

5. *Of the Writ.*

The limitation of the action is six months, and it must be commenced by original, which should recite the statute; and unless the writ be tested forty days (53) after the robbery, the whole proceedings may be reversed by writ of error (54).

Note 1. If several persons in one company be robbed, they must bring several actions, unless they happen to be joint owners of the money, &c. taken from them. 1 *Com. Dig.* 198.

Note 2. The high constable to whom the bond is given defends the action, by appearing on behalf of the hundred, and the inhabitants indemnify him by a rate levied upon them for that purpose, that he may suffer no loss.

6. *Of the Declaration.*

In addition to other essentials, these things must be observed. 1st. The declaration must be against the *inhabitants* of the hundred generally; for if it be against any in particular, and they are not all named, it will be deemed bad (55); but it need not recite the original at large, nor more of the statute than applies to the action (56); and this agrees to

(53) *Morg. Vad. Mec.* Vol. II. p. 42.

(54) These forty days are, because by the stat. 8 G. 2. c. 16. if any one of the felons (1) by whom the robbery was committed, be apprehended within forty days after notice in the *Gazette*, the hundred is not liable.

(55) *Morg. Vade Mec.* V. II. p. 42.

(56) Therefore that part of the act need not to be taken notice of, which relates to the burning of houses. 5 *Com. Dig.* 198.

(57) Although the robbery were committed by several, if one be taken it is sufficient; but this must be pleaded, as it cannot be given in evidence under the general issue.

the mode of declaring on a deed; for there is never any occasion to set forth more of the covenant than is necessary, as even that never fails to make the record long enough, without adding what is superfluous (57). Therefore, if the declaration recite the sense of the statute, although not in the same words, it is sufficient (58). 2d. The count must shew the time of the robbery, so that it may appear to the court, that the action was not commenced before the proper time. 3. It must shew the robbery to have been within the hundred, and upon the highway. 4th It must alledge notice. 5th. That the plaintiff had a property in the money, &c. taken from him, and what he lost ought to be particularised (59); but with the same certainty as in trover is sufficient (60). 6th. The conclusion must be contrary to the form of the statute (61).

7th. Of

(57) As to the mode of reciting a statute, either in declaring or pleading, the day, year, and place of the making of it must be shewn; therefore it is necessary to set forth the days of the commencement and conclusion of the parliament, or the adverse party may demur.

Mr. *Morgan* in his *Vade Mecum*, V. II. p. 200. observes, that he thinks the proper way of pleading is to say, at a parliament begun and held at *such a day*, at *such a place*, and from thence continued, by prorogation, or by several prorogations, until, &c.

(58) *Morg. Vade Mec.* V. II. p. 43.

(59) But in the writ this is not necessary.

(60) 2 *Sand.* 263.

(61) But if it conclude contrary to the form of the statute, it may be demurred to, notwithstanding that the whole law upon the subject is regulated by several statutes and not by one: for which Mr. *Morgan* (1) gives this reason, *i. e.* because the action is founded upon the statute of *Winton*, and he quotes *R. Yd.*

(1) *Morg. Vade Mec.* V. II. p. 45.

7. *Of the Plea.*

The general issue is "not guilty;" though any special matter may be pleaded, if necessary.

8. *Of the Venire Facias.*

The jury must *not* be of the same hundred.

9. *Of the Evidence necessary to sustain the Plaintiff's Case on the Trial.*

The rule "that no man can be an evidence in his own cause," is in this case dispensed with; and indeed it must be so from the very nature of the case; but then the plaintiff's testimony should be corroborated by circumstances (62); and the giving the first notice, and advertising the second in the *Gazette*; must be proved on the trial, of course, unless admitted by the defendant. In like manner too, as the plaintiff himself may be a witness, so may any person inhabiting the hundred, notwithstanding his situation as a defendant (63).

10. *Of the Execution.*

After judgment no process can be legally served on the high constable, or any inhabitant of the hun-

116. and 1 *Ventris* 235. but certainly this reason is a very bad one; for as several statutes regulate the law, what objection can there be to putting them in the plural number? *Common sense*, one should think, on these occasions ought to be the *best authority*.

(62) But by 22 G. II. c. 24. no person can recover in hue and cry more than 200*l.* unless at the time of the robbery there were two persons present, and they attest the loss.

(63) 8 G. II. c. 16.

dred;

dred; but the sheriff, on the receipt of the execution, must shew it *gratis* to two magistrates in or near the hundred, who are to cause an assessment to be made, pursuant to the statute of the 27th of *Eliz.* c. 13. as the exigency of the case may require; but the high constable must first make oath before them of his expences, his attorney's bill being first taxed. And the money being thus received by the sheriff, he is obliged to pay it over to the party entitled thereto, without fee; but he cannot be called upon to return the writ till within 60 days after the return therein mentioned.

HUSBAND and WIFE.

A *feme covert*, i. e. a married woman; living apart from her husband, having a separate maintenance, may be sued as a *feme sole*, or single woman; and the circumstances of her having disposed of such maintenance does not alter the case, nor is the husband liable even for necessaries; but the wife is in all respects, with regard to the debts she contracts, looked upon as a *feme sole*.

Equally so where a married woman has a separate maintenance, and acts therewith as a *feme sole*, she is liable to answer as such. *Corbett v. Poelnitz*, *M. T.* 26 *G.* 3.

In case credit be given to the wife of a man in exile, she alone is liable: the like where a husband has abjured the realm, or is transported. *Ibid.*

Note 1. Where common process is against husband and wife, service on the husband is sufficient for both, and he must appear for himself and her too; otherwise the plaintiff may enter such appearance for him. *Barnes* 412.

Note

Note 2. But in case of *bailable* process, in *Edwards v. Rourke et Uxor*, M. 27. G. 3. the wife was discharged out of custody, because she was arrested without her husband; though the writ was sued out against both, and *non est inventus* returned as to him.

Second Husband.

A second husband is liable to pay all debts contracted by his wife, while she lived in a state of *separation* from her *first* husband, having a separate maintenance. *Corbett v. Poelnitz*, M. 26 G. 3.

3. *Causes for which Husband and Wife must sue jointly.*

1st. In all personal actions for any thing *due* to the wife before marriage.

2d. So in all actions *real* respecting the wife's lands.

3d. The like if the wife hold any thing in *auter droit*, as by being an executrix, administratrix, or trustee; for although the property in dispute is not her own, nor that of her husband, who has still less to do with it, yet she cannot sue alone.

4th. And wherever the estate or thing in dispute is the joint property, both ought to join in the action; also, wherever the wife could maintain the action, *did she survive her husband.*

Torts.

5th. For a personal wrong to the wife, as an assault, &c. the action is a joint one.

4. *Causes*

4. *Causes for which they must be jointly sued.*

It will be sufficient only to lay down the *general* rule, that in all such cases wherein, if husband and wife be aggrieved, and ought jointly to sue, so, *è converso*, where they are *aggressors*, they ought to be made *joint defendants*; as if a wife contract a debt *dum sola*, the action must be against her and her husband both.

Note 1. But if *A.* and *B.* be sued as husband and wife, *A.* cannot plead *ne unques accouple en loyal matrimonie*, because the legality of marriage is not triable in personal actions; For a husband *de facto* is liable to his wife's debts. See *Morg. Vade Mec.* Vol. II. p. 433.

Note 2. Defendant's wife being taken in execution for a battery, committed by her on the wife of the plaintiff, the court will not discharge her, although her husband be not taken with her, if there appear no intention to screen him. *Wils.* 149. *Str.* 1237. And *Barnes*, p. 263. observes, if husband and wife be both taken in execution, the wife cannot be discharged.

INFANT.

ALL persons under 21 years of age are deemed infants; and as to their capacity, the general rule is, that they may do any thing for their advantage, but nothing to their prejudice; because no one ought to impose upon their want of experience; but what we are chiefly to treat of here is,

1. *How they are to sue.*

Which is by *prochein amie*, i. e. their next friend, and appointed as *infra*.

2. *How*

2. *How they are to defend.*

This is by guardian, who must be appointed by the court, *before the plaintiff can declare.* This is done by the guardian and infant appearing before a judge at his chambers, or by petition to the chief justice, engrossed on a treble penny stamp, signed by the infant, with the consent of the guardian subscribed likewise; of the truth of the execution of which the witness to the signatures must make affidavit. Upon this the judge then makes an order, that the infant may *sue or defend*, as the case may be.

3. *Plea.*

When the cause of action is such as the infant is not bound by, and he wishes to avail himself of his minority, he must plead it specially. See *Plea of Infancy*. P. 168.

Note. When an infant does not appear by guardian, on affidavit being made of the service of process, and of the defendant's being an infant, and his not having appeared, the judge, without taking out a summons, will make an order, that unless the infant appear within so many days after personal service, the plaintiff may assign *John Doe for his guardian*, and enter an appearance for him; but as this order is only *nisi*, it is necessary that a final one be first obtained, to give the plaintiff this power; in order to which, affidavit being made of the personal service of the order *nisi*, the judge will make an order *absolute*.

INFORMER.

An informer is a person who sues for the sake of recovering a penalty given by an act of parliament, which is most commonly half to him, and half to the king; in which case the action is called a *qui tam*, because *qui tam pro Domino rege, &c. quam pro se ipso in hac parte sequitur*; he sues as well for our sovereign lord the king, as for himself.

Therefore if any informer make a composition, by taking money or promise of reward, and that either to the use of himself or another, *without consent of the court*, he is liable to stand in the pillory, be disqualified as an informer in future, and to forfeit 10*l.* (64)

But there is a *distinction* to be taken between a common informer and a party grieved. In the latter case the penalty is given wholly to the plaintiff; for the *one* sues merely for the sake of getting the amount of the penalty out of the defendant; but the other is a person whom the defendant is supposed to have injured. And therefore the law has provided him with this particular remedy to reimburse himself.

No Costs for Plaintiff.

In no case, however, where an action is brought on a penal statute, is the plaintiff entitled to costs, unless the statute particularly so direct; though, if the verdict be against him, he must pay costs; which is no more than right; for if he recover, the penalties in most cases are high enough.

(64) 18 *Elix. c. 5. s. 3* and 4.

Note.

Note. In *qui tams*, the king's share must be paid into court, before any rule can be drawn up permitting the informer to compound. See *Black. Rep.* in *C. P. Wood qui tam v. Ellis* and another, 1154. Also *Wood qui tam v. Johnson*, 1157.

INSOLVENT DEBTOR. See Prisoner.

JUSTICES of the PEACE, CONSTABLES, &c:

I have purposely chosen to consider magistrates and their officers under one head, because the officer is justified under the magistrate's warrant, provided he do not exceed the authority thereby given him, which it is his duty at all times to execute with humanity; for however inferior the station of constable may seem, it is highly proper that the persons employed therein should behave with that degree of prudence, which renders even the meanest office respectable; and stamps a becoming reputation on the character of the person executing it. It is for this reason that all laws ought to protect their officers in doing right, and punish them in doing wrong. And this is the principle of the *English* law: for by the 24th of G. 2. c. 44. no action can be sustained against a *constable*, or person acting by his order, if he deliver a copy of the justice's warrant to the party, or his attorney demanding the same, in writing; but on neglect or refusal, in six days after such demand he becomes culpable. On the contrary, if he deliver the copy of the warrant, and permit the original to be perused as by law required, the proof of this circumstance will acquit him on the trial (65). For every magistrate is wholly answerable for the war-

(65) And by stat. 7 Jac. c. 5. a constable, or person acting under him may plead the general issue, and give the special matter in evidence, and upon obtaining a verdict is entitled to double costs.

RANT

rant he issues, the constable being answerable only for the proper execution of it. (66)

Magistrates.

By the same statute, (67) no action can be brought against a magistrate, unless he have *one month's previous* notice delivered him in *writing*, by the plaintiff or his attorney, whose name and place of abode ought to be indorsed; *but respecting this, see Title, Customs and Excise, from which may be at once collected the whole law respecting these kind of notices.* And the magistrate in like manner may tender amends within the month, but after the action is commenced, the money must be paid into court.

Note. The limitation of the action, as well against magistrates as their officers is six months, and to both are given double costs in case they substantiate their defence.

MARTIAL LAW.

If any person be *tried* by a court martial, notwithstanding such prosecution was *malicious*, yet an *action* on the case *will not lie* against the prosecutor, to reimburse the injured party in damages.

This question was decided in the cause of *Sutton* against *Johnson*, in error in the *Exchequer Chamber*, *H. 24 G. III.* by which decision the verdicts of two *special juries* (68) were *set aside*, and such reversal

(66) It is the constable's business to keep the warrant, but he ought to certify to the justice what he did in respect thereof.

(67) 7 Jac.

(68) The first jury gave 5000*l.* and the 2d. 6000*l.* damages.

was

was afterwards confirmed in the House of Lords. The principal facts were as follow;

The plaintiff was captain of the *Isis*, one of the squadron under the command of the defendant (Commodore Johnson) last war. Being in *Port Praya* road, off the island of *St. Jago*, the squadron was attacked by *Monf. Suffrein*, 16th April, 1781; and an engagement took place in consequence. The *Isis* was damaged in the fight, and the French commander sailed away, when Commodore Johnson ordered all the ships in his squadron, to cut their cables, and sail after him; that being done, the British squadron formed a line of battle, and bore down about sun-set on the same day, but no further engagement took place. The captain of the *Isis* had been obedient in every thing, yet notwithstanding, the commander charged him with not having cut his cables according to orders; he then put him under an arrest, removed him from his command, and sent him first to the *East Indies* and then to *Great Britain*, to be tried by a court martial. From first to last the plaintiff was kept under arrest for near three years, i. e. from April 22, 1781, to December 11, 1783. The court martial before whom he was tried, sat at *Portsmouth*, on board the *Princess Royal*, the president was Admiral *Montague*. It appeared from the circumstances in which the *Isis* found herself, that Captain Sutton was justified in not immediately cutting her cable. He was therefore honourably acquitted of the whole charge.

Note. During the time of Captain Sutton's imprisonment, he declared he lost 20,000 *l.* which he should otherwise have gained by prizes; and besides this, he was 5,000 *l.* out of pocket, in consequence of his suspension, trial, &c.

The action he brought against Commodore Johnson, having been twice tried before the lord chief baron, at *Guildhall*, a motion was afterwards made on

on behalf of Commodore Johnson that judgment might be arrested, which after a very elaborate discussion of the case was refused. (69) *He then brought his writ of error*, by which the judgment in the court below was reversed. Captain Sutton then appealed to the House of Lords, the last resort of the subject; but there alas! the sentence of reversal was confirmed.

Note. Those who wish to be further informed as to this cause, will find it very fully reported in the first volume of the Term Reports.

MOTION. See Rule.

NON PROS, NON SUIT, NEW TRIAL,
Judgment as in Case of a Non Suit, and WITHDRAWING the RECORD.

NON SUIT differs from *non pros* in as much as it is a judgment given against a plaintiff, who has so far prosecuted his suit, as to bring it into court; but then upon the trial, being unable to prove some particular fact, the court permits him to be non-suited, in order that he may have the benefit, *if he think fit*, of bringing his action again. Whereas if the jury gave a verdict against him, he is barred from so doing, unless he move the court for a new trial, which must be upon some affidavit of the existence of certain facts, out of which arise sufficient reasons why a new trial ought to be had.

(69) We may call this a *third trial* decidedly in favour of Captain Sutton; before he had the verdict of two special juries in his behalf, and now he had the solemn opinion of three judges out of four of the same court in his favour, the chief-baron being absent, I believe, on account of indisposition.

As

As for example, suppose the plaintiff have (70) evidence to produce upon a subsequent trial, that he could not possibly for some *reason assigned* produce upon the former trial; as for instance, a fact perhaps with which he was *not* acquainted at the time. In such case, if the court think the application reasonable, they grant a rule to *shew cause*, and if the defendant (though either party may move) think himself injured, he *shews cause accordingly*; and if he cannot, the court make the rule absolute. On the contrary, the rule is discharged with or without costs, as circumstances may deem reasonable; but always *with costs*, if the application be *frivolous*. But provided the damages be small, the court will very *rarely* incline to harass the parties with a second litigation, and most commonly when a new trial is granted, it is upon payment of your adversary's costs of going to trial in the former instance, new trial being wholly to accommodate the party applying. But *sometimes* the costs are ordered to abide the event of the second decision.

Here too a distinction ought to be taken between moving for a new trial, and in arrest of judgment, the former being to go *again to a jury*, but the latter only to argue some point of law before the judges, arising out of the record; in short, it is in the nature of a *demurrer after verdict, but before writ of error brought*, and this motion may be made even after a new trial has been refused; and the time for making it in *C. B.* is before the expiration of the rule for judgment, but in *K. B.* it may be moved any time before judgment is entered up. The mode of doing which is thus, the attorney for the party intending to move, speaks to the associate, to have the record in court, and gives a brief to counsel to move,

(70) And what is said as to *plaintiff*, applies *vice versa* to defendant.

“ *that*

"that entry of final judgment be stayed until the court otherwise order," which being granted, the rule is then drawn up, and a copy thereof served on the adverse attorney, who in order to dissolve this rule obtained by his antagonist, must then give notice, 'that he means to move to discharge it.' Of the service of which he makes affidavit and moving to discharge the rule the matter comes on for argument. If the judgment be arrested in consequence, the party who requested it so to be, draws up the rule of court and serves a copy thereof on his adversary; on the other hand, if the judgment be affirmed, then the party in whose favour the verdict was, draws up the rule, taxes his costs, and proceeds in the usual way.

Note. Before motion is made in arrest of judgment, it is always matter of consideration whether the defect be not cured by the verdict.

NON PROS differs from *non suit*, in as much as the former is given on the trial; but the latter is a judgment given against the plaintiff before trial, for not declaring, rejoining, &c. according to the copy of the rule he receives for that purpose.

The mode of signing a *non pros* (71) is as follows, and it is a *final* judgment; but it cannot be signed in *K. B.* unless common bail be filed within two terms; but in *C. B.* the defendant must appear as of that term in which process is returnable, and he has then any time during the vacation of the ensuing term.

Note. In *C. P.* there must be not only a rule to declare, but a demand of declaration also, which must be given before four days after the end of the ensuing term; but in *K. B.* neither is necessary *except* in replevin.

(71) No *non pros* can be signed if the cause be removed by *Habeas*.

But

But let us take an *example* in the *K. B.* for not declaring.

1st. Then the defendant's attorney gets a parchment roll, and enters thereon a warrant of attorney for the defendant only, preceded however by a memorandum of the term; and besides this, the *non pros* is also engrossed on a double half-crown stamped paper, which being done, the parchment and paper are both taken to the clerk of the judgments to be signed. (72)

Example.

As yet of the term of *Saint Michael*, in the year of the reign of *King George the Third*.
Witness *Lloyd*, Lord *Kenyon*.

[Warrant of Attorney.] The defendant puts in his place his attorney at the suit of the plaintiff, in a plea of trespass.

[*Middlesex*, ff.] The defendant according to the form of the statute, in such case made and provided, was served with a precept of our lord the king, called a bill of *Middlesex* (or whatever the writ be) issued out of the court of our said lord the king, before the king himself, directed to the sheriff of *Middlesex* (or whatever other county) returnable on next, after days from

now last past, to answer plaintiff in a plea of trespass; and the said defendant at that day appeared by his attorney, according to the form of the statute in such case made and provided, and the said plaintiff in the aforesaid court of our said lord the king, before the king himself, at *Westminster* aforesaid, hath not declared by his bill or declara-

(72) In *C. P.* to prothonotary.

tion in any personal action, nor in ejectment against him the said defendant, before the end of *Hilary* term then next following, being the next term after the appearance of him the said defendant. Therefore it is considered by his majesty's court here, that the said plaintiff can take nothing by his said precept, but that he be in mercy, &c. And it is further considered by the court here, that the aforesaid defendant recover against the said plaintiff—for his costs and charges laid out by him, about his defence in this particular, by the court of our said lord the king here adjudged to the said defendant, and by his assent according to the form of the statute in such case made and provided, and that the aforesaid defendant have his execution thereof, &c.

Nothing now remains to be done but to sue out execution.

Note. If the defendant were arrested, the *ac etiam* ought to be inserted in the judgment.

Before I quit this subject, there is still another distinction, which is that of judgment as in case of a *non suit*. It differs from *non pros* in as much as that is before, but this is *after* issue entered on the roll.

This judgment is therefore obtained most commonly for *not* going to trial pursuant to notice, and the court must be moved for a *rule to shew cause*, and if none be shewn, then on the day after the expiration of the rule, you *move* to make it *absolute*. But when cause is shewn, as for instance, the *absence* of a material witness, or the *insolvency* or *bankruptcy* of the defendant, then the court will discharge the rule. On the contrary, if it be made absolute, it is then stamped with a double half-crown stamp, and the master marks the costs upon the roll; in short, whatever the court orders, you proceed accordingly.

With-

Withdrawing the Record.

This is when after the trial is called on, the attorney for the plaintiff happens not to be in court, so that he is permitted by his counsel to withdraw the record, to prevent his client's being non suited, which nevertheless must be done, if the defendant insist upon it. The effect however of the withdrawing the record, which is sometimes called *striking the cause out of the paper*, is, that the plaintiff may then give a fresh notice of trial for a future time, on payment of the defendant's costs of the day, *i. e.* all those accrued since notice of trial given.

OFFICES.

The Law Offices are situate as follow:

Of B. R.

THE Master's is in the *King's Bench Walk, Inner Temple.*

The Clerk of the Judgments and Declarations, in the same place.

Signer of Latitats, ditto.

Seal Office, No. 2, *Inner Temple Lane.*

The Clerk of the Rules, in *Portugal Street, Lincoln's-Inn Fields.*

The Clerk of the Treasury's, at *Westminster Hall.*

The Clerk of Nisi Prius, *Inner Temple.*

The Bill of Middlesex Office, is in *Clifford's Inn.*

Sheriff's Office for London, *Grocers' Alley.*

For Middlesex, the corner of *Curfitor Street, Chancery Lane.*

Of C. P.

The Prothonotaries', *Tanfield Court, Inner Temple.*

The Warrant of Attorney's Office, is in *Pump Court, Temple.*

The Secondaries', in *Crown-Office Row, Temple.*

The Clerk of the Treasury's, at *Westminster.*

The Associates', in *Serjeant's Inn.*

The Filacers', where *capiases* are signed, No. 4, *Hare Court, Temple.*

, *Exigenter, Holborn Court, Gray's Inn.*

Clerk of the Errors, at *Master Pepy's Chambers, Gray's Inn.*

Note. The judges' chambers are all in *Serjeant's Inn*, and if any of the above offices be removed by the time this publication comes out of the press, the reader may easily correct the error, by enquiring at any one office where another is.

ORIGINAL.

This like all other writs is in the nature of a letter from the king to the sheriff, directing him what to do with respect to the defendant. But an original cannot be sued out, for a less debt than 10*l.* (73) nor for a greater debt will the plaintiff be allowed more costs than upon process, unless it amount to 50*l.* except indeed the defendant be outlawed. (74)

These originals then are of *two species*; the *præcipe*, and the *si te fecerit securum*. The first is used

(73) 5 G. II. c. 27.

(74) R. M. 23 G. III.

when

when the action is in debt or covenant; in a word, where any thing specifically is demanded, but where the damages are to be assessed *ad libitum* by a jury; as in case, there the *si te fecerit securum* is the proper writ to sue out. We shall therefore select that for our example in *K. B.* supposing the action to be for the gold repeater, &c.

Example.

[*Middlesex, ff.*] If the plaintiff make you secure, &c. then put, &c. the defendant, late of *Westminster* in the said county, gentleman (75); that he be before us on (one of the return days in the almanack) wheresoever we shall then be in *England* (76), to shew for that whereas (here the whole declaration is set forth at length).

This the attorney for the plaintiff makes out on paper, without a stamp, and then he takes it to the filacer, who makes out the *capias* (77) as follows:

George the Third, &c. To the sheriff of *Middlesex*, greeting. We command you that you take the defendant, late of *Westminster* in your county, gentleman, if he be found in your bailiwick, and him safely keep, so that you have his body before us, on the (78) after wheresoever we

(75) The true degree of the defendant must be inserted by original, and the town, &c. in which he last resided in the county.

(76) This return is peculiar to originals, not as to the day, but the place.

(77) Though commonly the attorney makes the *capias* as well, for expedition sake; but the filacer has his fees notwithstanding.

(78) The return of the *capias* ought to be after that of the original. If you proceed to outlawry, indeed, the return of the original ought to be the *teste* of the *capias*; but if you do not mean

we shall then be in *England*, to answer the plaintiff in a plea, for that whereas (here the declaration is copied over again) adding also, and have there this writ. Witnesses *Lloyd Lord Kenyon*, the day of in the year of our reign.

The filacer's name (79).

—— Attorney.

Bail for 60*l.* 10*s.* (80)

Note. Every original writ must bear *teste* at least 15 days before the return; but the morrow of the Ascension is a good return, notwithstanding its not being 15 days after the effoign day of the morrow of Holy Trinity. 16 *Car. I. c. 6 & 7.*

I need hardly mention, that if the defendant be not taken on the first *capias*, an *alias*, and then a *pluries* may issue; and that if the action be bailable, a warrant must be taken out at the sheriff's office, and given to an officer to whom it is directed; but if the writ be not bailable, then the notice to appear as in p. 10. must be inserted, leaving out the words "at *Westminster*" and inserting instead "wheresoever we shall then be in *England*."

Appearance and Bail.

This is entered by the defendant's attorney with the filacer; the time for doing it is within *eight* days after the *return*; but if the action require special bail, and the defendant reside within 20 miles of *London*, he has till four days after the *quarto*

mean to proceed to outlawry, they may both be tested and returnable on the same day.

(79) And originals, after being signed, must be sealed also.

(80) But it is *not necessary* that the defendant should be arrested on an original; he need only be summoned.

die

die post, and if above 20 miles, he has two days longer.

Note. This is when the writ is returnable on any other return than the first; but if *on the first*, then in *London or Middlesex* four days, but above 20 miles from town *six days*.

Bail is put in with the filacer at a judge's chambers, of which the defendant's attorney ought afterwards to have notice, as in other cases.

Declaration.

In declaring by original, instead of stating the defendant to be in custody of the marshal, the preamble runs thus:

(81) [*Middlesex, ff.*] The defendant, late of *Westminster* in the county of *Middlesex*, was attached (82) to answer the plaintiff in a plea of trespass on the case (83), and whereupon the said plaintiff by his attorney complains, for that whereas (proceeding as usual) and concluding, and therefore he brings suit, &c.

Note. No pledges are added.

The rest of the proceedings are similar to those not by original.

(81) Take care to lay the *venue* in the same county into which the *capias* issued, provided the action be *bailable*; as, if not, the bail will be discharged.

(82) But if the action be in debt, say "summoned."

(83) But if in debt say, "of a plea that he render to him the sum of (the debt), (1) which he unjustly detains, &c."

(1) If on a bond you insert the penalty.

Quare

Quare clausum fregit.

This writ is peculiar to the *Common Pleas*, and is usually taken out against persons on whom a personal service may be found difficult; it is left at the sheriff's office, and you take out a summons, which is given to an officer to whom it is addressed, and he leaves it at the defendant's house.

Then, in case the defendant neglect to appear, you may sue out a *distringas* against his goods for 40s. which are taken accordingly; and the issues from time to time increased, by moving the court. But let us take an example.

Example.

First, the plaintiff's attorney makes out a *præcipe* thus :

[*Middlesex, ff.*] Original *quare clausum fregit*, for plaintiff against defendant, late of *Westminster*, gentleman, broke the close at *Westminster*, returnable before his majesty's justices at *Westminster*, in (name some return marked in the almanack). (84)

— Attorney.

This, with the warrant to prosecute, he takes to the curfitor of the proper county, who makes out the writ; upon which the defendant having been summoned, the attorney for the plaintiff then searches at the filacer's to see if he have appeared; and if he have not, then he files the writ with the *custos brevium*, getting it however first from the sheriff, with his return thereto; and the *custos brevium* then gives the attorney a note of the name of the cause, and

the sheriff's return: and if the return be "notice to the defendant," then the attorney makes out a *distringas*, upon which the sheriff grants his warrant to one of his officers, to distrain the defendant's goods to the value of 40 s. which being done, and the writ returned, then if still defendant do not appear, plaintiff's attorney makes out an *alias*, which like the original *distringas* is both *signed and sealed*, and if no appearance be then entered, motion may be made in the treasury to increase the issues, the same as against *Peers*; and then *another* motion must be made to sell them. See *Peers*, &c.

Appearance.

The time for defendant's entering an appearance expires on the *quarto die post* of the return of the writ, and it is entered with the filacer.

The rest is as in other cases.

We shall now, in order to preserve the concatenation of things, though it does *not* come in alphabetical order, treat of outlawry; because no man can be outlawed, unless the suit be begun by *original*; and in *C. P.* there is another kind, *as well as the quare clausum fregit*, called a special original; but after what has been already observed, an example of that kind would be *superfluous*.

OUTLAWRY.

Original having issued, with its *capias*, as above described, and an *alias* and *pluries capias* (85) thereon, the above four writs being got returned at the sheriff's office *non est inventus*, you then issue a 5th writ, called an *exigi facias*, commanding the sheriff in five successive courts to require the defendant to appear; and at the same time a 6th writ issues, called a writ of proclamation (86), which commands the sheriff to proclaim the defendant upon three several days, according to stat. 31 *Eliz.* whereof one proclamation must be made near the church door of the parish wherein he resides.

The fifth writ being returned *primo exactus*, *secundo exactus*, *tertio exactus*, *quinto exactus*, and *ideo utlagatus*, and the 6th *proclamari feci*,

A seventh then issues, called a *capias utlagatum*, which may be against the body only, or against the body, goods, and lands altogether; and if the defendant have any goods, the sheriff must appraise them by an *inquisition*, plaintiff paying the charges of it, and the writ being returned, it is taken to the filacer in the *K. B.* (but in the *C. P.* to the clerk of the outlawries) who transcribes it, and transmits it to the *Exchequer*.

(85) These four writs may all issue at once, but they must have different *retes*, as there must be fifteen days between the *rete* and return of each, in the order they follow one another; but the return of the first may be the *rete* of the second, and so on. Now the intent of these four writs were, that the defendant should have so many distinct notices; but being taken out at once, he is apprised in no such way. Therefore, why would not one of these writs serve the purpose, as well as sue out four at a time?

(86) This writ is directed to the sheriff of the county in which defendant resides; whereas the other is directed to the sheriff of the county to which the original was directed.

Then

Then apply at the remembrancer's office for an 8th writ, called a *venditioni exponas*, i. e. empowering the sheriff to sell what he has taken; but before he can pay the plaintiff the money arising from such sale, if the debt do *not* amount to 50*l.* the plaintiff must apply by motion to the court of *Exchequer*, who, upon reading the return to the *venditioni exponas*, order payment of the money.

*But if the Debt be above 50*l.**

The plaintiff must then apply by petition to the lords of the treasury for the money to be paid him in satisfaction of debt and costs; which petition is then referred to the solicitor of the treasury, who examines into the nature of the demand, and makes his report accordingly; whereupon he procures a warrant from the treasury to the attorney general, that he may consent to such money being paid on motion in court. The court then make an order, which is drawn up by the clerk in court, who at the same time seals a *subpœna* for the sheriff to pay the money on demand.

The *usual fees* of outlawry altogether are about 20*l.* but they must in a great measure depend upon the length of the original.

Note 1. If the defendant be taken on the *capias utlagatum*, and the action *not* bailable, he may be discharged on entering a common appearance; and if bailable, on giving a bail bond with two sureties to the sheriff, as in other cases. And the outlawry may be reversed in the first case by a judge's order, in the last by motion in court; and then the plaintiff must proceed *de novo*. He must even sue out a fresh original, if he mean to sue by original again. In short, he must proceed as in other cases, supposing no prior proceedings to have been had; but in such case, however, the defendant must always reinstate the plaintiff in his costs.

Note

Note 2. If the action be against two, and one cannot be arrested, you must proceed to outlawry against him.

PARTY WALL.

A LESSEE for 21 years, at a pepper corn for the *first half year*, and rack rent for the remainder of the term, covenanting at the same time to pay land tax, and all other rates, charges, and impositions, and also to put the premises into complete repair; *having assigned his term for a small sum in gross*, is nevertheless *not* liable to pay the expense of a party wall, either by the provisions of the 14th G. 3. c. 78. s. 41. or by the covenant in the lease. This being a charge falling on the original landlord, *Southall v. Leadbetter*, M. 30 G. 3. in B. R.

PAUPER, or POOR PERSONS.

No person is deemed a pauper *in law*, who is worth 5*l.* besides his clothes; which, when people are so reduced in life, are *generally* pretty ragged.

As the costs are so high, ought not this to be extended to 40*l.*? that being the risk at least run in the first instance, by any person who brings a common action; for suppose him to be non-suited, his own costs will be at least 25*l.* and those of his adversary about 12 or 15*l.* if in B. R. but if in C. P. about a fifth part more. I mention this, because I presume the origin of supporting paupers was to let those have a hearing *gratis*, who could not afford to pay for one.

A pau

pur
It is

ALPHABETICAL CHAPTER. 269

A pauper should therefore be permitted to be worth as much as the amount of the risk a man runs by bringing his action; and this is saying *nothing* of the calamities that may arise, if error be brought.

Every body knows that, by the law of *England*, poor people are to have counsel and attorney assigned them *gratis*; but then this cannot take place till such time as they are paupered, the manner of doing which is as follows:

First, the pauper must petition a judge on a treble sixpenny stamped paper; to which must be annexed an *affidavit* of his poverty on another treble sixpenny stamped paper, for which must be paid swearing at the judge's chambers one shilling; and then the clerk makes out an order, charging 2*s.* 6*d.* more.

By this time it is mathematically demonstrated, that the poor man is 6*s.* 6*d.* poorer than he was before; but being once paupered, he then pays no more fees during the whole course of the suit, *unless* he recover 5*l.* in which case he must pay 4*l.* 12*s.* 8*d.* before he can receive a farthing of it!

The court fees being	-	-	£ 2	16	8
Passing the record not less than			1	0	0
<i>Postea</i> stamp, and the master for marking	0	9	6		
Paid before	-	-	0	6	6
			£ 4	12	8

PAYMENT of MONEY into COURT.

This is done by giving a brief to counsel for that purpose, who signs the same. His fee is 10*s.* 6*d.* It is carried to the signer of writs, who takes the money,

270 ALPHABETICAL CHAPTER.

ney, and gives a receipt for it; and then both brief and receipt being taken to the clerk of the rules, he draws up a rule, a copy of which must be served on the plaintiff's attorney with the master's appointment to tax the costs. But in *C. P.* if the money do not exceed 5*l.* you get a treasury rule of the secondary, upon which the prothonotary will receive the money, writing a receipt in the margin of it. But above 5*l.* you give a brief to a serjeant, and proceed as above.

Note 1. A plaintiff is entitled to all costs up to the time that defendant pays the money into court, notwithstanding that he afterwards proceeds for further damages. *Harley v. Bateson*, *H. 27 G. 3.* in *K. B.*

Note 2. Observe that payment of money into court *differs from tender*, which must be made before action brought; but even after the action is brought, the money before tendered must be paid into court notwithstanding; and in such case, if the plaintiff do not upon trial, prove more than what the defendant had before offered to pay him, a verdict will be given against him; permitting him nevertheless to receive the money paid in for his use.

Note 3. Refusal to pay upon a fresh demand, vitiates a former tender.

PEERS and MEMBERS of PARLIAMENT.

Preliminary Observations.

A peer cannot be arrested, nor can his person be taken in execution, although a verdict be obtained against him. Nor can a member of parliament be arrested, or taken in execution, during the sitting of parliament; not for forty days after, nor for forty days before. In short, a member of parliament can seldom, any more than a peer, be taken in execution

tion at all. Judge *Blackstone* takes notice (87), that parliament is seldom dissolved for more than eighty days at a time. But a member, if a trader, being served with legal process for any just debt, amounting to 100*l.* may be made a bankrupt, unless the same be discharged within two months, *this circumstance being deemed an act of bankruptcy.*

1. *Bill.*

A peer, or member of parliament, may be sued by original, or by bill, the proceedings being somewhat similar to those against attornies; the latter being engrossed on a treble penny stamped parchment, and filed with the clerk of the declarations in the *K. B.* and in *C. B.* with the filacer of the county wherein the venue is laid. But there is this difference:

1st. In a parenthesis, you state the member's privilege (88) thus:

[*Middlesex, ff.*] The plaintiff complains of defendant, esquire, having privilege of parliament, of a plea, &c.

And in the conclusion, the words "contriving and fraudulently intending, craftily and subtilly to deceive and defraud the said plaintiff," must be left out.

2. *Prayer for Process according to the Statute.*

After and therefore he brings suit, &c. must be added, and hereupon the said plaintiff prays the process of our lord the king, according to the form of

(87) *Comm.* V. III. 165.

(88) If a peer, set forth his title.

272 ALPHABETICAL CHAPTER.

the statute in such case made and provided, to him thereon to be made, and to him thereon it is granted, &c.

Pledges to prosecute,

John Doe and Richard Roe.

3. *Writ of Summons.*

The bill being filed, a writ of summons is sued out, and taken to the sheriff, who thereupon grants a summons, which being given to an officer, is left at the defendant's house.

4. *Non Appearance.*

In case the defendant do not appear within four days after the writ is returnable, then a *distringas* may be issued, and upon that the sheriff's warrant, directed to an officer, to distrain the defendant's lands or goods for 40s. and this being done, if the defendant still neglect to appear upon the *quarto die post* after the return of the *distringas*, get the writ, with the return to it, from the sheriff's office, and take it to the filacer, for the purpose of his making out an *alias*, upon which

6. *Move the Court.*

To increase the issues under the statute of 10 G. 3. c. 50. i. e. that the distress upon the second *distringas* may be greater than the first was; and if the debt be small, the court usually direct the rule to be drawn up, that the issues be so increased as to pay the plaintiff the debt; but if the sum be large, then the plaintiff must be at the expence of a *pluries distringas*,

tringas, and moving the court (89) again; and if the defendant do not pay the issues in money, then the plaintiff must be at the *further* expense of moving for a rule to shew cause, why the several issues returned upon the several writs of *distringas* should not be sold.

Thus much for proceedings against Peers and Members of Parliament, "by bill," all the other parts of proceeding not taken notice of above, being the same as in other cases.

Note. But if defendant appear, you deliver him a declaration, which instead of being on parchment, is engrossed on a treble penny stamped paper, and it is neither more nor less than a copy of the bill.

By Original.

By original, defendant is summoned, &c. as by bill; and in the declaration, instead of attached, say, "summoned."

PRISONERS AND INSOLVENT DEBTORS.

A prisoner differs from an insolvent debtor, in as much, the former includes every person detained in jail for debt, whereas the latter only describes that species of prisoner, who being charged in execution, claims his *groats* by the lords' act, it is therefore of the former that we shall first treat.

When a defendant is arrested, he is usually taken to the house of some sheriff's officer, vulgarly called a *spunging* house, whence if he be unable to find bail, he is taken to the county jail; but if he choose, he may remove himself *thence* to the prison.

(89) Though this may be done by *side bar*.

T

of

of the court, out of which the writ issued, whereby he was arrested. But there is no necessity for his going absolutely to *Newgate*, it is the same in contemplation of law, if he remain in the house of the officer till a *habeas* can be procured for his removal, for he is in the custody of the sheriff from the time of his being first arrested.

The prison of the court of *King's Bench*, is that which bears its name; and that of *C. P.* the *Fleet*; therefore upon the *habeas* being obtained, the custody of the prisoner is transferred from the sheriff to the marshal of the one, or the warden of the other.

Respecting the mode of putting in bail, that has been already treated of at length, *p.* 81. but when the defendant goes to jail, the plaintiff is bound to declare against him before the end of the term after that, in which *process* was returnable, and cannot obtain a rule for time.

If no declaration as above, defendant by his attorney may apply for a judge's (90) summons, to shew cause why a superseas should not issue, which must be served upon the plaintiff's attorney; and if he neglect to attend, upon affidavit of the service of the summons, where, when, and on whom; the judge will make an order upon filing common bail, (91) and the marshal upon the clerk of the common bail's certificate, without a superseas, will discharge the defendant; but the sheriff requires the writ.

(90) But the defendant's attorney must first apply to the jailor for a certificate of the causes for which his client is detained in custody, and affidavit must be made of the jailor's signature.

(91) But in the court of *C. B.* three summonses are requisite, and the order is in the first instance only *nisi*, to give the plaintiff's attorney time to write to his client, and then if on the expiration of the order *nisi*, no cause be shewn, the judge will make the order absolute, upon which the defendant may then issue his writ of superseas, directed to the sheriff or warden, as the case may require, to discharge him; having however first entered a common appearance.

Of the Declaration against a prisoner.

As to the manner of declaring, the first consideration ought always to be in whose custody the unhappy man is detained, whether in that of the sheriff, or whether in that of the marshal or warden.

In the court of *K. B.* the reader knows there are two ways of proceeding, by original, and by bill, the former being seldom used; but in cases where the debt is above 50*l.* on account of the heavy expense attending it; though it need not be used even then; we shall therefore in this place only speak of the latter, as it is natural to suppose there can occur very few cases, wherein it is necessary to declare against a prisoner by original. Most prisoners are poor, but suppose your adversary to be rich, it seldom serves your cause to run him to an unnecessary expense.

Example in B. R. by Bill.

First then of declaring against a prisoner in the custody of the *sheriff*.

Instead of one copy of declaration, as would only be delivered to him in case he found bail; (92) the plaintiff's attorney delivers him four copies, (93) *viz.*

(92) See p. 276.

(93) Surely in point of reason there can be no necessity for all these copies, as in *C. P.* only two copies of the declaration are made out, one of which is delivered to the turnkey, and the other annexed to an affidavit of such delivery, is filed with the secondary, and he gives you a rule to plead, and no demand of plea is necessary.

Note. Unless the turnkey, &c. deliver the declaration, &c. to the prisoner he is liable to an attachment.

276 ALPHABETICAL CHAPTER.

The 1st. Written on a treble-penny stamped parchment, is filed with the clerk of the declarations.

2d. On a treble-penny stamped paper, is delivered to the jailor or turnkey, or to the prisoner himself.

3d. Is annexed to an affidavit of the service of the second, and the

4th. Is annexed to an *office copy* of such affidavit, upon which the clerk of the rules marks the day of filing the affidavit, and writes the rule to appear and plead, in which the time being always mentioned, no mistake arises respecting that particular.

As to the manner of drawing the declaration, it is the same as in other cases, except that of stating in whose custody, and at whose suit the prisoner is detained; for if the defendant be in the custody of the sheriff, the declaration must not state him to be in the custody of the marshal: (94) but instead of which, it must state him to be in the custody of the *sheriff*, at the suit of the plaintiff, and upon what *process*, and when the same was *returnable*; in other respects the declaration is the same as in other cases.

Of declaring against a Prisoner in the Custody of the Marshal.

Instead of four copies, as in the custody of the sheriff, only two are made out, one on parchment served upon the turnkey, who delivers it to the prisoner, and the other is filed with the clerk of the declarations; nor need any affidavit be made of the

(94) Though in other cases, the custody of the marshal is only the fiction on which the court proceeds.

service,

service, but a rule to plead is given at the clerk of the rules as in other cases.

Note. If the prisoner be *not* in custody *ass.* plaintiff, he ought to be so charged by suing out a writ, which must be left with the jailor or turnkey; and if the plaintiff be desirous that the prisoner should put in bail, in case of his being discharged from confinement, he must make affidavit of the debt as in other cases.

Supersedeas.

Hitherto we have only treated of this writ, as obtained by prisoners, for the plaintiff's *laches* in declaring. we shall therefore here mention those causes, through which a prisoner may be entitled to his discharge on entering an appearance. The first of which is for not proceeding to judgment in three terms after the delivery of declaration, that in which it was delivered being accounted one; and second, for not proceeding to execution in two terms after judgment.

In both these cases application is made for a judge's summons, to shew cause why the defendant should not be *discharged* by *supersedeas*; but in either case, and in either court, *three* summonses must issue; but observe that if the defendant supersede the action before judgment, the plaintiff is not prevented from taking him in execution after judgment; but if he supersede for the plaintiff's not charging him in execution, then he is finally discharged.

Insolvent Debtor.

By this term is understood any prisoner charged in execution for a debt not exceeding 100*l.* this therefore

therefore is a qualification to become a *candidate* to receive *groats*.

To procure a prisoner his *groats*, will therefore be our present object of inquiry; the first step then necessary to be taken is, to exhibit a *petition* to the court,

Setting forth,

1. A just account of real and personal estate, either in his own *possession* or in the *trust* of another for his use, at the time of his *first* imprisonment, and this either in possession, remainder, or expectancy, and the security relating thereto, with the names and places of abode of the witnesses.
2d. The like at the time of his petitioning.

But before any such petition can be received, notice thereof signed by the prisoner fourteen days previous, must be given to the creditor; or if the creditor cannot be found, *then* to his attorney or agent last employed in the action. This notice must contain a schedule of the prisoner's effects, except wearing apparel and bedding for himself and family, and the tools of his trade, but not *exceeding* 10*l.* in value in the whole.

Of the service of this notice with its particulars, affidavit must be made at the time of the delivery of the petition, and upon reading the petition, the court makes a rule for the prisoner to be brought up on a certain day, and for *summoning* the creditor to appear personally, or by attorney at the same time.

Of the service of the Rule, &c.

Of this, affidavit must be also made, and on the day appointed, the court will examine into the matter

ter of the petition; but if the creditor shew cause of disbelieving the prisoner's statement, and desire further time for information; the prisoner is then remanded to a future day, when if the creditor do not appear, he is discharged; but if he do, and agree to allow him 2 s. 4 d. a week, he may insist upon his detention; however, if at any time he fail in the payment of it, the prisoner on application to the court may be discharged.

Note. If more creditors than one insist on his detention, they must pay him a sum ordered by the court, not exceeding 1 s. 6 d. a week each, and the day of payment is every Monday, (95) whatever may be the day on which the prisoner were remanded. See stat. 32. G. II. c. 28.

For the rest respecting prisoners. See Habeas Corpus.

PROMISSORY NOTE AND BILL OF EXCHANGE.

If the holder give time to the acceptor of a bill of exchange, or drawer of a promissory note after it has been dishonoured, 'the indorser is discharged.' And the holder must give notice of the bill being dishonoured without delay; but what is reasonable notice, is a question of law arising from the particular facts. However, where the holder and drawer do not reside in the same town, the holder ought to write, 'That the bill is dishonoured by the first post.' *Findal and others v. Brown, E. T. 26 E. 3. B. R.*

But notice of a bill being dishonoured by the drawee, is not necessary to be given to the drawer;

(95) *Douglas's Reports.*

if

if he have *no effects* in the hands of the drawee, either at the time of drawing, or when the bill becomes due. *Bickerdine* and another, assignees of *Reichard v. Bollman*, M. 27 G. III. in B. R.

If the indorsee of an inland bill of exchange, delay giving notice to his indorser of *refusal* to accept it, the indorser is discharged. Nor is the subsequent proposal on the part of the indorser to pay the bill, he *not knowing of the acceptor's laches*, a waiver of the want of notice. *Goodall v. Dolley*, E. 27 G. III. K. B.

Fictitious Indorser.

In the House of Lords,	{	<i>Minet and Fector,</i>
February 14, 1791.		<i>v.</i>
		<i>Gibson and Johnson.</i>

Livesey and Co. drew a bill on the defendant for 721 l. 5 s. payable to *John White*; *no such man being in existence*. The bill was however accepted by the defendants, and discounted by the plaintiffs in the fair course of trade, upon whom therefore *no imputation whatever lay*. The facts were put into the form of a *special verdict*; but the difficulty arose from the *general rule of law*, that the indorsee must derive his title through the medium of the first indorser, *by proving his hand-writing*. In the present case that could not be done, it was an impossibility, for there was no such man, *he was a John Doe*. The question therefore was, whether the bill should not be considered as payable to *bearer*; and it was *so decided*; for nine out of the judges thought so, but the chancellor, chief baron, and judge *Heath*, thought differently. The judges were much pressed by the chancellor to say, 'Whether the indorsement of *White's* name was not a forgery,' but they were of

of opinion, that as the special verdict had not in terms stated an intention to defraud, *they could not draw the inference* which lay within the province of a jury.

Note. The cause had been previously tried before Lord Kenyon, at Guildhall, and a special jury of merchants in consequence of the direction of the chancellor.

But prior to the cause of *Minet and Fector v. Gibson and Johnson*, it had been decided in the case of *Tatlock and another v. Harris*. (96) 'That where a bill of exchange was drawn in favour of a fictitious person, (the fact being known to all parties concerned in the drawing the bill,) and the drawer had received the value of it from the second indorser; *a bona fide holder for a valuable consideration might recover upon it*; in an action against the acceptor for money paid, or money had and received. The facts of this case were simply these, the defendant and others drew a bill upon the defendant, (97) in favour of *Gregson and Co.* or order for 512*l.* 4*s.* payable three months after date, which the defendant accepted. The first indorsers therefore were these *ideal gentlemen Gregson and Co.* the second *Lewis and Potter*, who indorsed to the plaintiffs. 'The point of law came on to be argued, in consequence of a *demurrer to evidence*, which established the above facts. In short, it is an ingenious way of manœuvring! when people know they cannot overturn your truths, they wish to divide the nerves of your tongue, thus to deprive you of the powers of speech! But in the present instance, it did not succeed, for Lord Kenyon in delivering the unanimous opinion of

(96) *E. 29 G. III. R. B.*

(97) Defendant also carried on a business alone, and resided in London, but was partner in a house at Nottingham, carried on under the firm of *Harris and Plant*.

222 ALPHABETICAL CHAPTER.

the court, observed, 'That the jury would have drawn this inference, that the fact of no such persons being in existence as *Gregson and Co.* was notorious to all the parties in the transaction, but particularly to the defendant.' On these facts then, said he, what the conscience of the case is, *no man living can doubt*; for as it was vastly clear that the defendant had received the value of the bill, in common justice he ought to pay it.

Judgment was therefore entered for the plaintiffs.

Note. The court forbore to decide the question of the first indorsement being a felony, as they did not think themselves bound so to do.

R U L E.

A Rule is an order of court of which there are three species.

1st. The *side bar rule*; *as* for plaintiff to have further *time to declare*, defendant not being in custody.

2d. The rule granted on motion of course; so called because it is made absolute on the first application, and mostly without opposition.

3d. Rule *nisi*, or rule to shew cause, (98) which is granted conditionally, that in case the adverse party do not shew sufficient cause to the contrary, then it is to be made absolute; *as* in the case of a motion to set aside a judgment irregularly signed against the defendant by default, the rule *nisi* is an

(98) Upon a motion for a rule to be made absolute in the first instance, a notice is necessary, but not upon a rule to shew cause.

order

order of court for the plaintiff to shew cause why, for such irregularity the judgment should not be reversed.

A *motion* then is an occasional application to the court by counsel, commonly grounded on an affidavit, respecting some interlocutory matter which cannot be pleaded.

And it is by this kind of application then, that the two last mentioned rules are obtained, and they both agree in this particular, that the motion for either must be founded on an affidavit.

As to the rule to shew cause, the time mentioned therein is usually four days, when the counsel who applied for it must then move to make it absolute, when his adversary may shew cause why it should not be made absolute. (99) And this shewing cause, may either be grounded upon an affidavit contradicting some fact advanced by the party on whose behalf the rule was obtained; or it may be upon the ground that the facts contained in the applicant's own affidavit, are insufficient to establish his motion; for an affidavit is to a motion, what *viva voce* evidence is upon a trial at *nisi prius*; it is on the credit or discredit given to the facts, stated by the evidence, or their sufficiency or insufficiency, that the jury find their verdict; so upon the sufficiency or insufficiency of the facts stated in an affidavit, or their probability or improbability do the judges discharge or make absolute their rules of court.

Note. An order is what is made by a judge at chambers, founded on a summons; but before an attachment can issue on it, it must be made a rule of court by motion. See *Attorney* and *Attachment*.

(99) The court can discharge with or without costs, according to their discretion, which they regulate according to circumstances.

RULING the SHERIFF.

Provided the plaintiff do not approve of the bail taken by the sheriff, he is *not* obliged to take an assignment of the bond; but he may direct his attorney to get a rule from the clerk of the rules in *K. B.* or secondaries in *C. B.* to *compel him to return the writ*, a copy of which must be left at the sheriff's office, with the name of the officer who arrested the defendant indorsed.

The plaintiff's attorney then searches at the Treasury Chamber, *Westminster Hall*, with the *custos brevium*, for a *return to the writ*; and if he find none, the plaintiff may move for an attachment against the sheriff, *grounded* upon an affidavit, of the issuing the rule, the service of the copy, and the having searched with the *custos brevium* of the term the writ was returnable, but that no return was found.

If however the writ be returned *cepi corpus*, the sheriff must at the same time put in bail *above*; if not, he may be *ruled again* to bring in the defendant's body; and then if the bail be not good, or if put in and excepted to they be *not* perfected, you may *then*, move the court against him for an attachment.

Note. No sheriff, after he is out of office, can be ruled, except within *six months*.

SAILOR and SOLDIER.

NO person enlisted to serve as a *seaman* on board any of his majesty's ships, can be arrested out of the king's service for a less debt than 20*l.*
1 G. 3. c. 14 and 15.

Nor

Nor can a soldier, provided he be a *volunteer*.
25 G. c. 6. s. 64.

S A L E.

A bidder at an *auktion*, under the usual conditions that the highest bidder shall be the purchaser, may retract his bidding at any time *before* the hammer is down. *Payne v. Cave*, in K. B. E. 29 G. 3.

Stamped Agreement.

A broker who bought goods for his principal, agreed for half *per cent.* to indemnify him from any loss on the re-sale. It was held, that such an agreement, if reduced to writing, need not be stamped, as being a contract relative to the sale of *goods*, which by the 4th section, c. 58 of the 23d G. 3. is exempted. *Curry v. Edensor*, in K. B. H. 30 G. 3.

S E T O F F.

This is in the nature of *cross action*; but a set off *reducing* the plaintiff's demand below 40s. does not affect the jurisdiction of the court; consequently, if the plaintiff recover a shilling damages, he is nevertheless entitled to his costs. 3 *Wils.* 48. *Strange* 1191. *Onsl. Nisi Prius*, 172.

Note. But no set off is allowed in replevin; yet if an *action* be brought for the rent, it is otherwise.

The principle which regulates set off is, that the debt be of a similar nature to that on which the action is brought; and there are two species. The one the *general issue*, with notice of set off at the bottom of it; and the *other*, the *special plea* of set off:

286 ALPHABETICAL CHAPTER.

off: this latter is used when the defendant's demand is secured to him by bond, or indeed any other instrument *under seal*, agreeable to the rule, that all deeds must be pleaded. However, in such *special* plea of set off, the exact sum due must be stated. See 8 G. 2. c. 24. which is made perpetual by the 14th G. 2. c. 34. 21 G. 2. c. 33. and 24 G. 2. c. 28.

Note. A plea that plaintiff was indebted to defendant *at the time of the plea pleaded*, is bad. It should state that he was indebted to him at the commencement of the action. *Evans v. Proffer*, E. 29 G. 3.

But let us take an example of notice of set off delivered with the general issue, which must also be written on a treble penny stamped paper.

In K. B.

Plaintiff against Defendant.

Take notice that the above defendant will, on the trial of this cause, give in evidence and insist that the plaintiff, before, and at *the time of the commencement* of this suit, *was and still is* indebted to him the said defendant in the sum of 100*l.* for the work and labour of him this defendant as a *carpenter*, done for the said plaintiff, and at his special instance and request; and also for divers materials, and other necessary things, found, provided, used, and applied, in and about such work, and at the like special instance and request of the said plaintiff. And also, *before and at the time of the commencement* of this suit, the plaintiff was and still is indebted to the defendant in *other* 300*l.* for divers goods, wares, and merchandises, by the said defendant sold and delivered

vered to the said plaintiff, and at his like special instance and request. And likewise, before and at the commencement of this suit, the plaintiff was and still is indebted to the defendant in other 300*l.* for money by the said defendant laid out, expended, and paid for the said plaintiff, at his like special instance and request. And the said plaintiff, before and at the commencement of this suit, was and still is indebted to the said defendant in other 300*l.* for money lent and advanced to the said plaintiff, and at his like special instance and request. And before and at the commencement of this suit, the said plaintiff was and still is indebted to the said defendant in other 300*l.* for money by the said plaintiff had and received, to and for the use of the said defendant. And before and at the commencement of this suit, the plaintiff was and still is indebted to the said defendant in other 300*l.* for money due and owing from the said plaintiff to the said defendant, upon an account stated between them; which said sum of 300*l.* is still due and owing from the said plaintiff to the said defendant, and out of which sum he the said defendant will, at the trial of this cause, set off and allow the said plaintiff so much against any demand which the said plaintiff may prove at the said trial, as will be sufficient to satisfy the same pursuant to the statute in such case made and provided. Dated the

day of 1792.

Your's, &c.

Defendant's Attorney.

To Mr. Plaintiff's Attorney.

Note. Thus the reader will readily observe, that notice of set off is nothing more than a declaration of *assumpsit* in miniature, leaving out the *promises to pay*. Since therefore these promises can be implied in the *cross action*, why express them in the original one?

S H I P P I N G.

The admiralty court has no jurisdiction where a vessel is *injured* in the *Thames*, within the body of a county; and if it interfere, the court of K. B. will grant a prohibition of course, without imposing any terms on the party applying. *Velthausen v. Ormsley*, K. B. T. 29 G. 3.

But as to the question of freight claimed by a neutral master against the captor, the admiralty has jurisdiction. *Smart v. Wolff*, T. 29 G. 3. in K. B.

The admiralty court may also take cognizance of an *hypothecation* bond, given during the course of a voyage, although it be executed on land, and under seal. *Meneton v. Gibbs*, E. 29 G. 3. in K. B.

But an absolute *bill of sale*, given of a ship while she is yet out at sea, is *void*; unless the certificate of the registry be recited according to 26 G. 3. c. 60. s. 17. This question arose in an action of trover brought to recover the ship *Commerce*, from London to *Jamaica*, from the defendants who had taken possession of her, on her arrival in *England*. *Rolletson and others, assignees of Margetson, v. Hilbert and others*. K. B. M. 30 G. 3.

See *Abandonment*.

S T O C K J O B B I N G.

If two persons engage in a stock jobbing transaction, in which they incur losses, and in consequence employ a broker to pay the differences, and one of them repay this broker with the consent of the other, he may recover a moiety from that other, in an action for money paid for his use; notwithstanding the 7th G. 3. c. 8. which avoids and declares illegal all stock jobbing

jobbing transactions. *Petrie v. Hannay*, M. 30 G. 3.
in B. R.

SUGGESTION on RECORD.

This is made when any one of the parties happens to die, and in short it forms a part of the pleadings; it being a circumstance in the history of the cause. Or it may be made upon the *court of conscience act*; and being a *fact*, the adverse party may plead to it, the same as to a count in a declaration: therefore it is usual to add your adversary's assent, "*which the said A. B. doth not deny*". In form, it is no other than a simple statement of the fact.

W A L E S.

NO person can be arrested in *Wales* by any process issuing out of any court of record at *Westminster*, unless the cause of action be 20*l.* or upwards; nor can bail be taken for more than the sum sworn to. Stat. 11 and 12th of *W.* 3. c. 9. s. 2.

WARRANT of ATTORNEY.

Warrants of attorney, or as they are sometimes called judgments (100), are securities taken for mo-

(100) Though in reality they are two things: the one being a power to enter up judgment in case of default in the condition: and the other a warrant of attorney, with the judgment *already entered up*; and in case of default, nothing is then to be done, but to sue out execution.

U

ney,

ney, either before or after action brought; and upon failure of payment, judgment may be entered up, and execution issue, without any form of trial whatsoever.

They are sold at the stationers, and the blanks may be filled up by any indifferent person; but the warrant must be directed to some one or more attornies of the court of K. B. or C. B. though the judgment need not be entered up by him or them to whom the warrant is so directed.

Note. No warrant of attorney given in a spunging-house is good, unless an attorney on behalf of the defendant be present, and witness the same.

How Judgment is to be entered up, the Warrant being a Year old.

If the warrant be a year old, a motion must be made in court (101), grounded on an affidavit of the due *execution* thereof; of what part of the *debt* is unsatisfied, and of the defendant's being yet *living*: this is if you enter up judgment in *term*. But if in *vacation*, you make the like affidavit, and a judge makes an order at chambers. Though if the warrant be *ten years old*, then motion must be made in court at any rate; and this judgment, like every other, upon just cause being shewn to the court, may be set aside.

Note. When judgment is entered up, common bail and a warrant to defend are filed according to 25 G. 3. and judgment is signed on a double 2s. 6d. stamp.

(101) It is a motion of course.

P A R T III.

Being the ELEMENTS *of a* PLAN *for* a REFORM:

Shewing that the Plaintiff's Costs in a common Action which at present amount to from 25l. to 35l. need not exceed 10l. and those of the Defendant, which are now from 12l. to 20l. need not exceed 6l.

Note. By the adoption of this plan, law, by being rendered less burthensome, would at once become more equitable: and all the inconveniences hitherto resulting from *juries* would be removed, because they would then *understand* the proceedings: which now, from their intricacy they cannot.

THE ALPHABETICAL INDEX

OF THE

PROCEEDINGS OF THE

LEGISLATIVE ASSEMBLY

OF THE PROVINCE OF

NEW SOUTH WALES

IN THE YEAR 1855

BY

JOHN H. STOKES

PRINTED BY

JOHN H. STOKES

AT THE

PRINTING OFFICE

OF THE

LEGISLATIVE ASSEMBLY

OF THE PROVINCE OF

NEW SOUTH WALES

IN THE YEAR 1855

BY

JOHN H. STOKES

PRINTED BY

JOHN H. STOKES

A
m
la
ph
ho
of
th
m
tu
on
ex
ni
co
pr
ha

An
un
the
re
po
the
ex
fur
tin
mu

P R O E M.

AFTER what has been stated in the first and second parts of this work, and proved to demonstration, can any one doubt the propriety of some laudable plan for amendment? Many have been the philosophers who have found fault with systems; few however who have proposed plans for the correction of those systems; and fewer still who have pointed out the means to carry such plans into operation, that they might be thereby brought to a well-flavoured maturity. But writing, as I have been, near 300 pages on the practice of law, and not finding it, on a candid examination, to answer the standard of truth, Humanity, and good sense, I should have left this work incomplete, had I not added some plan, calculated to prevent for the future, those calamities of which I have hitherto been complaining.

In this new and arduous undertaking, what star shall be my guide, what compass direct me in this unbeaten course? But alas! I will reject all wild theory, I will reject all doubtful speculation, I will reject every whimsical chimera, and select for my polar guide the philosophy of that bright luminary of the world, *Sir Isaac Newton*; that philosophy shall explore the hidden track, that shall the giddy height survey; that shall be my quadrant, and reason my time-piece. Those therefore who reject my system, must condemn his physics.

*Déjà de la carrière,
L'auguste vérité vient m'ouvrir la barrière.*

VOLTAIRE.

The

The first rule of philosophizing laid down by Sir Isaac Newton was, *That no more causes of a natural effect be admitted than are true, and sufficient to account for the phænomena thereof.* For throughout all nature, where one law appears sufficient to accomplish the design of the great Creator, we have never yet found that he has made two. Thus, *the electric fluid always takes the shortest road, and chooses the best conductor.* Objects of vision present themselves to us in that line which comes last to our eyes; and if the light have suffered ever so many refractions, those various lines, by the simplicity of the laws of nature, are transferred into one right line, and in this we perceive the object.

Because, therefore, that the *decisions* are right in our courts of justice, which I am very ready to admit, in *honour* of the judges, no inference can be drawn that the rectitude of those determinations is founded on the present length of proceedings. No: the true reason is, that justice, like the rays of light, has so divine an origin, that however refracted in her course, however opposed in her just inclinations, still, if not totally overcome, she transfers herself at length into that one straight line, at whose point she fixes herself, a brilliant star, to illumine the judgment of mankind.

But notwithstanding the many lines transferred into one, yet many and various refractions necessarily render that line the longer, and consequently the object more confused, the necessary effect of distance. Let us then approach justice the nearer, in reducing the heavy expense attendant on enjoying the benignant rays of her enlivening countenance. There is no danger of our doing too much justice; it is a particular in which we cannot be too exact; and the nearer we approach the throne of the goddess, the greater composition of mercy will be found in our judgments.

Since

Since then the laws of nature are so simple, why should the rules which guide our morals, be so intricate, perplexed, and confused?

As in physics all things gravitate to one common centre, so in morals all things gravitate to one common sense. It therefore becomes our duty, *to examine what parts of the present system of the practice of law are useful and good; and what superfluous, useless, and bad; thereby to enable ourselves, like good chemists, to separate the purer spirit from the grosser mass.*

In doing this, let us observe the same order as we did in the first part of our work, beginning with the common action *not* bailable.

CHAPTER I.

Of the W R I T.

WITH regard to process notailable, it was observed in p. 1. that the writ in substance is no more than a letter from the king to the sheriff, commanding him to take the body of the defendant, but which in fact he never does, because it is not intended that he should. Now of what use a command can be, which is never intended to be executed, I cannot really see. I must leave that point to be determined, *not by those who study the philosophy of Sir Isaac Newton, not by the astronomers of the West, and the navigators of the world; but by the astrologers of the East, and the magi of antiquity.* And as to the *English* notice at bottom, directing the defendant to appear, this serves at once to condemn the *writ part*, because it confesses it to be of a nature sufficiently confused to require an explanation, it proves that the writ, like the *prayers of the Roman Catholics*, is written in a tongue unknown to the nation at large; and yet strange to tell, that every individual of the nation (except practising attornies, and other officers of the courts) is bound to obey the mandate when called on. The reason why the *Roman Catholics* so originally wrote their prayers, was no doubt the better to support the *Pope's* authority, which the more enlightened part of the catholic community has thrown off, leaving that authority to be bowed to only by the mere ignorant papist.

As to the defendant's appearance bringing him into court, *it is farcical*; his plea would bring him to the full as well, and better too, for that is an
 answer

answer *negative or justificatory* of his conduct. The declaration and plea involve in them, *the question of the plaintiff and the answer of the defendant*; but the writ and appearance neither involve in them the one nor the other, but are both totally foreign to the matter in dispute; though concerning them many disputes frequently arise, if not among the learned, at least among the lawyers, that to the clients on either side are not of the smallest consequence. By the *abolition therefore of the process and appearance*, we should inevitably get rid of all the difficulties attendant upon mistakes in filling up the one, and filing the other, and thence the calamities resulting; for good, there can spring none; for what advantage can arise to either party from that, which does *not* involve in it one single particle of their dispute?

But here rises up the ghost, "the wisdom of our ancestors," rather let us say the misfortunes of our forefathers were the first foundation of writs; if people insist on arguing historically, let them examine the page with attention, and separate the leading facts from the false colouring.

The first legal writer that this country ever boasted was, *Judge Blackstone*, and he tells you (1) in his commentaries, 'that writs were introduced by the *Normans*,' they are therefore no other than a badge of tyranny, such as is worn by parish boys upon their coats, marked and numbered to shew to whom they belong: there is a note too at the bottom of pages 271, 272, (2) wherein that great lawyer takes notice of books of practice, "he observes, they are pretty much on a level in point of composition and solid instruction;" in that respect I perfectly agree with him, for there is not

(1) Vol. III. 273.

(2) *Com.* Vol. III.

one written in a style any thing like the liberal, or fit to be understood by any but a very small part of the profession. "He observes further, that which bears "the latest edition is usually the best; but Gilbert's "History of the court of Common Pleas, is a book of "a very different stamp, it has traced out the reason of many parts of our modern practice from "the feudal institutions, and the primitive construction of our courts."

Then in fact, here is the best evidence that history can afford, *that writs have their origin in the feudal tenures*, grounded upon that same narrow policy, that as all the lands were to be held under the crown, as of *Norman* gift, so in effect personal property, which at that time was only fleeting, should have the same tenure. "Those therefore "who arm themselves at all points against innovations, here let them shoot their arrows, here they "have an innovation of the most dangerous kind, "let them wound it, let them destroy it."

In the happy days of the *Saxons*, suits were not commenced by writ, but by plaint; (3) that is, by a private memorial tendered in court to the judge in writing, in the nature of the declaration of the present (4) day; and the judge of *common right* was bound, without any mandate from the king, to administer justice.

Those gentlemen therefore, who choose to support the continuation of the use of writs must fail in their ground, if they found their arguments on antiquity.

What are the blessings which we are entitled to expect, and have a right to enjoy in consequence of the glorious revolution in 1688? are they the continuation of the shackles of *Norman* slavery, or the

(3) *Black. Com.* 3. 273.

(4) Only much shorter and easier to be understood.

abolition of every mark of tyranny, ignominy, shame dishonour, and disgrace to a free people? I rather think myself, that we are to enjoy the blessings and advantages of the latter, in preference to the continuation of the misfortunes of the former; for not only ancient but modern times and modern practice, concur to condemn the use of writs; for in those actions which are of great consequence, and which are generally the most difficult of any others to decide; I mean those of ejectment, no writ at all is sued out, *but the declaration is the first process.*

If therefore a writ be not necessary to the advancement of justice, in a cause respecting landed property, of much less consequence must it needs be, in the suit which relates only to personal. If a suit, which may and often does involve in it the largest estate in the kingdom, can be commenced without a writ, why compel the poor man to issue one, who sues only for a debt, perhaps not larger than forty shillings? But certainly, if it be not necessary in one species of action, it cannot be so in another; and since no part of the injury received by the plaintiff is recited in the writ, (5) nor any part of the defence of the defendant recited in the appearance; and since history, experience, reason, analogy, religion, virtue, morality, good sense, philosophy and common honesty, all concur to condemn them, *I beg leave to propose their total abolition;* and to make the declaration the first proceeding.

(5) Though in some proceedings by original the declaration is added to the writ, but then this has no other effect than to make the writ unnecessarily long, for the defendant does not plead directly but only appears, and then the plaintiff declares afresh, which in short is no other than nine tenths of the writ over again, and to this declaration the defendant then pleads or demurs, therefore in those suits commenced by original, where the writ recites the declaration, the evil is only increased.

CHAPTER II.

Of the DECLARATION.

EVERY body must admit that this part of the proceedings cannot be dispensed with, as it differs widely from the one we have been just now treating of; for numerous are the conveniences arising from the plaintiff, previously giving in his true cause of action in writing, and the defendant that defence, which he means to make to the complaint against him.

It is by means of the pleadings, that the court is informed of the issues agreed upon by the parties to be disputed, and by that means nothing foreign to the matter in question, is ever permitted to disgrace an *English* court of judicature. Therefore, that each party should give in his case in writing, is a contrivance, no doubt as ancient, as the invention of writing itself. It is thus as the arts increase and flourish, that life, liberty and property are better protected.

But then it is by no means necessary that the declaration, by means of so many counts, should repeat the cause of action seven or eight or more times, and *neither time state it exactly as it is*, so that neither the defendant can know the complaint against him, nor the court the particulars of the injury which the plaintiff conceives himself to have sustained, *without the addition of some further lights.* "I mean the particulars of the plaintiff's demand," which cannot be obtained but by having recourse to a judge's summons. (6) But these particulars I would have delivered in at first as his true cause of action;

(6) See p. 19.

for if the plaintiff cannot tell what his own demand is, how is it possible for any one else to tell? he is party to the transaction, and therefore must know it, and consequently ought to divulge it, for his attorney can be acquainted with nothing unless from him, he having first the information. His duty is then to put the matter in a clearer point of view than the plaintiff could himself, that it may be the better and not the worse understood by the defendant; and it is equally the duty of the defendant's attorney on the other hand, to illustrate the matter of his client's defence, so as the more easily to convince the plaintiff of his mistake, if he have made one. And thus, assisted by the clear lights of philosophy, should the priests of civil controversy endeavour to bring about a reconciliation between the parties. But if they will not be reconciled, but insist on referring the matter to the decision of a jury of their countrymen, assisted by the abilities and integrity of an *up-right* judge, it is perhaps of all other ways, the wisest means of happily determining even the greatest differences, with the fewest difficulties.

The matter being in court, it is then the *duty of the advocates* on each side, to render the cases of their clients as lucid as their abilities, and the truths with which they are furnished will enable them; and as the pleadings of which the record is composed, form the subject matter of what is to be proved by either party, and that no evidence can be received, but what relates to the averments therein contained; so it is perfectly clear that the jury, who are to decide upon the truth of that evidence, ought to understand that *record* which it is meant to *support*, in order to satisfy their minds as to the proper application thereof: this is the matter of fact, which it is their duty to decide in contemplating their verdict. They ought to examine first how far the evidence on the part of the plaintiff tends to establish, the
aver-

averments, that he has set forth in his declaration? and how far that of the defendant tends to destroy them? they should first consider whether the plaintiff have proved his case? and if he have made out a question, then whether the defendant have answered it? thus putting the evidence on one side into one scale, and that of the other side into the other scale, and drawing no inference but such as humanity and good sense will warrant, assisted by the sacred flame of justice and freedom, they can never fail of reducing their verdict to the greatest degree of moral truth.

The duty of a judge is to see that no undue advantage is taken of each other by the counsel, and to suggest himself such questions to the witnesses, as his understanding and experience may suggest to him, as well as to see what improper evidence be received; or to use a legal phrase, "not to travel out of the record;" in short, the judge is the moderator of the cause, who is ultimately to sum up the evidence with accuracy and integrity; of the due weight, truth, and application of which, the jury are at length to determine.

Instead therefore of the present primary divisions of actions into "*injuries with force, and injuries without force,*" I shall beg leave to divide all civil injuries that occur to us; First, into those cases wherein the defendant has received a valuable consideration from the plaintiff for the sum he demands, and consequently, may with great ease be reduced to matter of account, including those wherein any specific thing is demanded, 'as a certain estate;' and Secondly, into those wherein although the defendant has received no valuable consideration, but wherein the plaintiff has nevertheless received some considerable injury through the defendant's means; and consequently, wherein the damages to be

be given are not considered as the payment of a debt, but the reparation of an injury.

Suppose we call the first, *actions of account*, and the second, *action for the reparation of injuries*. This division appears to me to be so plain, that it would be superfluous even to mention what would come under the one, and what under the other of the above heads.

As juries however are taken from all ranks of people indiscriminately, so it is proper that the language of a declaration should be such, as that all ranks may properly comprehend it. With regard therefore to actions of account, as we shall now call them, the best way of drawing the declaration seems to me to be after the nature of the double entry; because *merchants' accounts are universally understood*, as well by those who are not, as by those who are merchants; but special pleading is only understood by special *pleaders*, and sometimes not even by them. To be convinced of the truth of this proposition, I refer my reader only to the various books of precedents, the books of reports (7), those of the ordinary routine of practice, and the common mode and language in which the pleadings are drawn.

Without writing more upon this subject, with the reader's leave I shall now beg to propose, the form of declaration, according to the double entry, nevertheless preserving the accustomed preamble of the courts. We shall use that of the *King's Bench* for uniformity's sake, and preserving also our same cause of action we began with in our first example.

(7) I do not mean to find fault with reports; they are very useful: but I mean to make use of them as evidence of the many blunders and niceties that arise in pleadings; and alas! since so many are reported, how many more must there be that are not reported! The miseries of our jails can best declare!

Form

Form of the Declaration.

[*Middlesex, ff.*] The *plaintiff* complains of the *defendant*, being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea that the said defendant is debtor to the said plaintiff as follows:

Dft. Debtor.	£.	s.	d.	Dft. Creditor (8).	£.	s.	d.
For a gold repeater	30	0	0				
Engraving the letter							
F. on the out-							
side case thereof	0	5	0				
	£.	30	5				

To the damage of the said
plaintiff of thirty pounds
five shillings.

____ Attorney for the Plaintiff.

Witness (9) the proper officer,
this day of 179

No objection could be taken to this form of declaring because of the use of figures; for the mischiefs arising from erasure would be totally prevented, by the damages being neither more nor less than the aggregate sum expressed in letters: besides, if every figure were written over an erasure, that

(8) This would be evidence of the declaration having issued, and consequently would prevent any view the attorney might have in not serving it; for being obliged to make it out, he would serve it of course.

(9) But if the defendant be creditor, then let the plaintiff in the opposite column give him such credit as he ought to have; if none, let it be left blank.

could

could make no odds, as no part of the charge could be recovered then any more than now, without the verdict of a jury; the amount of which is afterwards expressed in the *postea*.

2. *Of the time for Pleading.*

As it is by no means my intention to take away from defendants any advantages they at present enjoy; but rather to consider the convenience of the debtor jointly with the security of the creditor, I shall beg leave to propose that the time for pleading be fifteen days (10). Why I propose this time is, because it is the time between the *teste* and return of an original writ; the reason of which, as assigned by *Judge Blackstone*, is that the defendant might have it in his power to come up from any part of *England*: for though I am an enemy to writs, and *Norman* tyranny; yet, if any good law can be found, although of *Norman* origin, I see no reason why it should not be adopted. For it must be a bad thing indeed, in which some little good is not contained.

Thus nought is useless made; nor is there land,

But what or of itself, or else compell'd,

Affords advantage.

PHILLIPS'S CIDER.

The like fifteen days then, I would fain allow for appearance; in order that the defendant might have time to write to, and receive answers from, his correspondents in the remotest parts of the kingdom; that from some he might receive a bill, payable a few days

(10) At present there are eight days after the return of the writ allowed for appearance, and then four for pleading, after delivery of declaration; these together make twelve; but suppose the declaration be filed *de bene esse* on the day of the return of the writ, even then eight days are allowed.

X

after

after sight, and thus discharge the plaintiff's demand, if a fair one. However, if the reader think these fifteen (11) days too many, or that the reasons above given are not sufficient to warrant that length of time, *it may be easily shortened*

3. *Of the Notice to plead, and Delivery of the Declaration.*

The notice to plead I would have given on the back of the declaration as at present, but with the day of the month in letters, expressing also, "to plead by attorney (12);" and as to the rule (13) to plead, and demand of plea, I would abolish them both, because the notice to plead on the back of the declaration is sufficient without either of them. In actions above 10*l*. I would have the service of declaration to be *personal*, but under that sum left at the defendant's house. *This would obviate a number of inconveniencies*; and though his name were wrong spelt or right spelt, he should be equally bound to appear by *his right name*, which no honest man ought to be ashamed to promulge: for it should be in law as in common conversation, if any one mistake your name, you are bound in common politeness rather to set him right than to be affronted with him. Indeed, as the matter stands at present, the courts give every possible *discouragement to dilatory pleas*; the strongest

(11) I would reckon the 15 days from the day of issuing the declaration; but that the defendant should not be taken by surprise, he should in no case be obliged to plead till eight days after service; by which rule the plaintiff's attorney could have no interest in being dilatory in endeavouring to find the defendant.

(12) This would at once answer to appearing by attorney.

(13) See P. 88. 89.

plea

plea in the world, why they ought to be totally abolished.

Of the P L E A.

As we pleaded the general issue in p. 21. to continue our example regularly, we shall do so here. The intent of it, it was observed, is neither more nor less than to negative the facts advanced by the plaintiff in his declaration. That form therefore must undoubtedly be the best, which expresses the meaning intended to be conveyed, in the plainest manner, and the fewest words. I therefore propose the following:

The defendant denies the truth of the plaintiff's declaration (14), and therefore puts himself upon the country.

——, Attorney for the Defendant.

Witness, —— the proper officer,
this day of *November*, 1791.

(14) And if the plaintiff be indebted to the defendant, let him continue his plea of the general issue, with a set off (after the word *country*) thus.

Because the said defendant saith, that the said plaintiff is on the contrary indebted to him as follows; that is to say,

Plt. Debtor.	£.	s.	d.	Plt. Creditor	£.	s.	d.
Upon a bill of exchange by him accepted, dated the 12th of <i>May</i> , at three months after date, for the sum of fifty pounds (or according as the nature of his demand may be)	50	0	0	And if any thing be owing that the defendant is inclined to give <i>credit</i> for, let him do so; if not, <i>leave this</i> <i>fide blank.</i>			

Issue.

The drawing the issue, as in p. 32, which repeats a second time the declaration and plea, I look upon to be wholly superfluous; for what occasion can there be for copying the declaration over again? The defendant must know what it is, *because he has had a copy before*; and what occasion is there for copying the plea over again? He must surely be acquainted with that, *because he delivered it*; it is his own answer. The method therefore I would propose for delivering the issue and notice of trial is as follows: for there seems to me to be no use for the delivery of the one without the other, unless the keeping the suit longer in hand, to no purpose but that of expense, can be so deemed, *viz.*

*Form of the Issue, and Notice of Trial.**In B. R.*

Michaelmas Term, in the 32d year of the reign of king *George the Third*.

The defendant having put himself upon his country, the plaintiff doth the like: therefore take notice of trial in this cause for the sittings after this present term. Dated the day of *November* 1791.

— Attorney for the plaintiff.

Note. Let the time between notice and trial be the same as at present. See p. 34.

RECORD.

In like manner as I look upon it superfluous to copy the pleadings a second time on the delivery of the

the issue, so do I deem it still more so, to copy them a *third* time, upon the issue roll. The engrossing them on the record would no doubt answer every purpose; for there could happen no material variance, but what either plaintiff or defendant, owing to their having copies of the pleadings previously delivered to them, might always easily detect. In ordinary, there is no more check than that at present; for the issue roll is rarely carried in till after trial, *and then of what use is it?* The entry of the issue on the roll I propose therefore to abolish as useless.

As to the writs of *venire* and *distringas*, I would abolish them also; for what is the use of commanding the sheriff to impanel a jury, when at the same time you do not mean that, *that* jury should come? And what is the use of issuing another writ to distrain upon the jury for not coming, whom you never called upon to come, and now do not intend to distrain on? In short what can be the use of issuing any writ, which from the nature of it cannot be executed?

By the stat. of 3. G. 2. c. 25. the sheriff is not to return a *separate* panel for every separate *cause*, but one and the same panel for every cause to be tried at one assizes, containing not less than 48, nor more than 72 jurors. Now since an act of parliament directs that a separate panel shall not be returned for every separate cause, what is the reason, in point of common sense, why, for every separate cause you should sue out a separate *venire* and a separate *distringas*? It can answer no purpose but to put the parties to *unnecessary expense*. An amendment, therefore, or rather an explanation of the above statute, would at once accomplish the desirable end of *abolishing* these two useless writs.

From

Form of the Record.

I would have it engrossed on parchment, as at present, but to consist simply of the pleadings between the parties, and that without their being confused with any extraneous or unnecessary matter whatever. And by the plan above laid down for drawing the declaration and plea, the record in general would not be above one 16th part, so long as it is at present; and with this advantage too, it would then be understood by the jury; whereas, at present, it is not uncommon for the record *even* to puzzle the judge.

Trial.

In this respect I would have no alteration take place whatever. For human wisdom I do not apprehend could devise a better plan than trial by a jury of our countrymen, aided by a judge (15) or judges of integrity, *and of such only is the present bench composed*; men equally renowned for their humanity, as distinguished for their learning.

Postea.

Instead of having the record delivered over to the victorious party, that he may engross the *postea* thereon, I would have it remain in the proper office, *in perpetuam rei memoriam* of what was done upon the trial, in like manner as the issue roll does now. And instead of the *postea* being made out in the form it is at present, I would have it simply indorsed by the clerk of *Nisi Prius* thus:

(15) In trials at bar all the four judges sit.

This

This cause coming on to be heard before the right honourable *Lloyd* lord chief justice *Kenyon* (16), on the day of 1791, the jury found a verdict for the plaintiff for thirty pounds five shillings (17).

— Clerk of *Nisi Prius*.

Then let the clerk of the *Nisi Prius* transmit the record to the *master*, who, when he taxes the costs, may enter their amount at the bottom of the *poslea*, and sign the whole, as at present; for which let him issue his *allegatur*, as a ground for suing out execution, *unless* the court otherwise order, by arresting the judgment, or making a rule for a new trial or hearing of error (18).

Judgment.

The four days now allowed for moving for a new trial, or arrest of judgment, I would have continue as at present; as being a very excellent rule, that in case the condemned party have any thing reasonable to offer against the judgment, or in favour of a revision of the cause, it may be attended to.

Execution.

As to the form and manner of issuing execution I would have that continue as at present; *but* that there should always be 15 days between the *teste* and return, agreeable to the *Norman* rule: for it does not signify who is the author of a rule; 'that it is a good one' — a sufficient argument with me in favour of its being adopted.' And in no case would I have

(16) Or whatever other judge might happen to sit.

(17) Or as the case may be.

(18) See Error *post*.

an execution ante-dated, nor any goods sold under one, *till 15 days after the levy made*, in order to give the condemned party an opportunity of raising the money within that time, and thereby preventing what is but too common at present, 100*l.* worth of goods being sold for 30 or 40*l.* at a day's notice. For it is by this hasty mode of doing things, that the debtor not only becomes ruined, but the poor creditor often loses a considerable part of his debt, and sometimes the whole; as must be always the case, when there is not enough to pay the lawyer's bill; and this is not unfrequently ten, and often *twenty*, times the debt.

Of Estates of Freehold, Copyhold, or Leasehold.
For all men's property ought to be held sacred to them alike, of whatever nature the tenure.

Instead of putting up a man's houses or lands (19) to sale, at so short a warning as at present, I would in no case have an estate sold in less than *three months*; yet still, immediately after judgment, the creditor should have a *lien* on it. For this purpose, let copies of the execution be served upon the tenants respectively, with notice not to suffer any sale, nor attorn to any new landlord; but that, nevertheless, all rent *then* due, or *to become due, until they received further order*, they should pay into the sheriff's office; and in case of not conforming with the said notice, let them forfeit three years rent to the party aggrieved, the same as tenants are now liable to do for secreting ejectment; (except indeed in case of not paying the rent in due time); but then the sheriff should have the same powers to recover, as the land-

(19) If leaseholds; for it has been already observed, that neither freeholds nor copyholds can be sold as the law now stands. See p. 54.

lord,

lord, had he been still entitled to receive; and in case of the owner's being in the actual occupation of his own land or house, then *let a sheriff's officer be put in possession.*

The reader will plainly see the intention of this is, that the condemned party should have these three months to raise the money upon mortgage, if he could not gather it by some other means.

Now as all this indulgence would no doubt be much to the advantage of the debtor, it is also proper that we should not lose sight of the creditor; but at the same time keep *him* within the pale of our consideration. Thus then it is no more than right, that the judgment should in all cases bear *interest* from the day of the giving the *verdict*, not at 5*l.* but at the rate of 10*l.* per cent. per annum. This would be a ready means of stimulating the debtor, to get rid of the incumbrance of the execution as early as possible; and in the mean time, *though he did not, yet the creditor would suffer no loss* in being kept out of his money, as I would have the master's certificate of the debt and costs be transferable by indorsement, the same being entered previously at the sheriff's office, in an indorsement book to be kept for that purpose (20); and there never would be wanting people on 'change to furnish the victorious party in an action with the full amount of his debt and costs, upon the transfer of such certificate.

Here then is at once a plan for executing judgment in mercy, wherein both the debtor and creditor are considered; by adopting it the creditor might be paid his money the moment he is entitled to execution, or however as soon as he could take the

(20) The same way in fact as stock is transferred at the bank; and the reason why the counterpart of the indorsement should be in the sheriff's book is to prevent forgeries.

master's certificate to change; while the estate of the debtor would be guarded against all the attacks of a sudden sale, *and his family thereby preserved from ruin*. As to the payment of the ten *per cent.* it would be trifling, were he obliged even to pay the interest for the whole three months, for suppose the debt 100*l.* the interest would be only fifty shillings. Now what is so small a sum for so many advantages? What is it when compared to the present extravagant charges in an attorney's bill?

This certificate would not only be an article in which monied men would be extremely happy to trade, *but* it would be an article that a creditor who could afford it, would be very happy not to dispose of. He could have no objections whatever, even to lie a second three months out of his money upon the same terms.

Note. It is matter also for the consideration of the reader, whether these three months could not also be extended to *all property whatever*, even household goods, or stock in trade, by keeping a bailiff in possession, where the amount is sufficient to cover the debt and costs. For certainly, it must be a great pleasure to every honest and well disposed citizen, to be able to seize an opportunity of securing *himself*, without depriving his fellow creature of his personal liberty.

It is the grand basis of our duty towards our neighbour, to be just in all our dealings. To provide proper laws to enforce the payment of debts, is therefore no doubt among the first duties of the legislature of a country; but those will be always found most adequate to the purpose, which can be executed at as little expense, as reason and common sense seem to direct. In framing such laws, we should always so contrive things, that the debtor should be induced to satisfy his creditor, and the creditor have an interest in indulging his debtor; and this most creditors would be at all times ready to

to do, having sufficient security in their hands. It is thus by reconciling the duty of man with his interest, that we find the readiest way of inculcating the moral duties; *but* when duty and interest are at variance, we banish by force, the human feeling from the human breast.

Interest is the ruling passion of man, so strong a tide ebbing and flowing in the human heart, that we should never oppose it, but with the greatest caution. Those who find fault with the actions of others, because they have an interest either in possession or reversion, are but *short-sighted politicians*; it is interest inclines us to acts of the highest virtue, and to vices of the foulest die; for which reason we should always so constitute our laws, as by interest to stimulate man to the virtuous, and by gain to destroy his propensity for *vice*.

C'est l'intérêt ce vil roi de la terre
Pour qui l'on fait la paix, et l'on fait la guerre.

VOLTAIRE. \

Of the C. A. S. A. or EXECUTION against the Body,

Agreeable to the principles of the *English* constitution, the body is the highest satisfaction the creditor can have, and therefore the personal liberty of a citizen cannot be too much protected. A liberty which I am by no means an advocate for the diminution, but for the extension of; and therefore the better to carry into effect, what we so fully treated of in the last section; let us propose, that if a person having lost his suit give into the sheriff's office, *an account of any estate in lands or houses,* (21) he may be possessed of, so that the same might be taken

(21) Or goods if the reader think proper so to extend it.

in

in execution, by the time that execution ought regularly to issue for the benefit of the creditor, in the manner abovementioned; the said estate being however sufficient in its principal value, to satisfy *the just demand* as well of costs as debt; then the creditor should be barred from suing out a *ca. sa.* against his debtor's person, or a *fi. fa.* against his *household goods, or other estate* in his occupation. By this means then, a man having property sufficient to answer any demand upon him, would never be degraded by having his person arrested, nor would his family be startled and surprised by the entry of bailiffs into his habitation. Calamities however, from which, nothing but a countervailing property, either politically can, or properly ought, in a commercial country to protect us.

Of the Sheriff's Poundage.

This which is at present five *per cent.* for the first 100*l.* and two and a half *per cent.* for every 100*l.* after, instead of being paid by the creditor, as is the case now, in all actions, except debt and covenant, I would have paid by the debtor; for it is hard enough for a man to have the misfortune to be obliged to have recourse to law for the recovery of his own, without taking part of it away from him when he has recovered it. Though according to my plan, as the sheriff would be so much longer in possession than he commonly is at present, I am apprehensive that where the debt is small, the present poundage would not countervail the expense, but then the only addition would be that of one or two men in possession for a fortnight, at a guinea a week; and this sum I am sure any one had much better pay, than suffer his things to be suddenly sold off, because during this time he might have some
 oppor,

opportunity of raising the money to discharge the demand.

Thus much for Actions of Account.

Of the ACTION for the REPARATION of Injuries.

As to this kind of action, I shall not propose the declaration to be drawn by the double, but the *single* entry; for it would be violating the principle on which we set out, to use the double entry where the single is sufficient for the purpose.

The form therefore I have the honour to submit to the reader, for declarations of this kind, is simply to *describe* the nature of the injury by *genus and species*; let us therefore proceed to give an example in trespass, and to be uniform in our proceedings, let us select the case of "*Tongue against Soufe*." (22)

1. *The Declaration.*

In B. R.

[*Middlesex, &c.*] *Deborah Tongue* complains of *Susan Soufe* being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself of a plea, that the said *Susan* committed an assault and battery on her the said *Deborah*, by boxing her ears at a tea table in a friend's house. (23) To her damage of 1000*l.*

C. Quilworthy, Attorney for the Plaintiff.

Witness the proper officer,
this day 1791.

(22) P. 60.

(23) Here you have the fact stated in a few words, and in an easy manner; you have the genus or general kind of offence, which

2. *Of the General Issue.*

The same general issue as served the action of account, would serve that of an action for an injury, *i. e.* the simple denial of the truth of the declaration. Thus, by having but one general issue, there would be no danger, as at present of an attorney's pleading one plea for another, as we took notice in our Elements of Special Pleading, with respect to *nil debet, non est factum, &c.* And where it so happens that you mean to deny any one particular fact in the declaration, but to admit others the rule which holds now would hold then, namely, that of mentioning the fact you mean to negative, but when you deny the whole, none in particular need be alluded to.

which is an assault and battery; for an assault and battery is common to every kind of striking, and you have the box on the ear, which is the species or particular manner of striking; you have also the place wherein it was committed, namely, at a friend's tea table.

But if the action were for a trespass against the property, the declaration ought no doubt to contain the parish in which the premises are situate, that were encroached on; because there as the estate received the injury, it consequently ought to be described; but in assault, the person only is insulted, and therefore it is sufficient that the person of the plaintiff be described by name.

To shew the ready application of declaring either way, according to the plan above laid down, let us frame an example in trespass against the property, *viz.*

[*Middlesex, ff.*] *Deborah Tongue* complains of *Susan Soufe*, being in the custody, &c. Of a plea that the said *Susan* committed a trespass on the land of the said *Deborah*, by turning her horse into the meadow of the said *Deborah* to graze, in the parish of *Hampstead*, (1) to the damage of the said *Deborah* of 50*l.*

(1) The county appears by the venue,

Thus

Thus much therefore for the genus of action, "relative to injuries," in which it is not necessary to proceed any further, for the pleadings being once finished, the distinction of it from that of account is fully demonstrated; to go farther would only be a repetition, we shall therefore now, to preserve the order of our work, proceed to Demurrer.

CHAPTER III.

Of DEMURRER.

TO abolish demurrer would be almost impossible, because it would at once give rise to so careless a mode of doing things; that as much confusion, would then arise from slovenliness, as at present is produced by quibbling, and no doubt you would be as much impeded by it; another thing, as some form is necessary for brevity and correctness sake, it is right to establish one, and consequently to compel people to adopt it: however, before we enforce it, we should first be well convinced of its goodness, for form was intended to assist, not to perplex; to explain, and not to puzzle.

We should have continued the cause of *Tongue* against *Souse* by demurring, as in p. 61. had it not been to shew the applicability of our form of general issue, as well to the one, as to the other genus of action; the digression however not having been long, the reader must yet have the form of the declaration fresh in his memory. Suppose therefore, that Mr. *Quilworthy* had been obliged to declare according to our plan, instead of the plan at present in use, and that he had left out in his declaration,
" by

“ by boxing her ears at a friend’s tea table.” Here the *species* of offence would have been omitted; the declaration would have stated an assault and battery, but then it would not have appeared of *record*, whether the blow were a box on the ear, or a kick on the seat of *honour*. The reader will recollect, that according to our plan, both genus and species were necessary to be stated, the omission therefore of the latter would have been clear cause of demurrer. Let us therefore propose a FORM.

“ The said *Susan* demurs to the declaration of the
 “ said *Deborah*, because *it* doth not state in what
 “ manner the said assault was committed. Where-
 “ fore the same being insufficient in law, the said
 “ *Deborah* ought not to maintain her action against
 “ the said *Susan*, who therefore prays judgment in
 “ her behalf.

“ C. Quibbleprop. (24)

Joinder in Demurrer.

“ But the said *Deborah* avers her declaration to
 “ be sufficient. Therefore take notice of argument
 “ on that point for *Friday* next. Dated the
 “ day of 1792.

“ J. Quilworthy, Attorney for the Plaintiff.

And as to the demurrer book, let that be made up by the attorney, instead of as at present by the clerk of the papers; indeed that is the case now in the court of C. P. why therefore should not the at-

(24) Note, I would not have counsel’s signature abolished to demurrers.

tornies

tornies of the *K. B.* have the same advantage, since they are equally capable of doing the business.

Of the Motion for a Confilium.

This I would have totally abolished, for what need is there to make a motion for *leave to argue a point of law*, any more than for leave to try an issue of *fact*. It is quite sufficient that the paper books be previously left with the judges, that they may know what is intended to come on for argument. But the reason for my wishing to abolish the motion is, because I think the notice added to the joinder, a much shorter mode of doing the business.

Thus much for demurrer, which I would always have special, abolishing wholly all general demurrer, for no defendant ought to be allowed to object to a plaintiff's declaration, unless he at the same time gave his reasons for so doing.

CHAPTER IV.

Of SPECIAL PLEAS.

HAVING demonstrated to what simplicity declarations, general issues and demurrers, might with ease be reduced, let us now proceed to special pleas; by way of example, I have selected a case from *Morgan's Vade Mecum*, Vol. III. p. 637. wherein the pleadings are carried as far as *Rebutter*, the whole containing near seven pages (25)

(25) I mean the precedents of the pleadings simply, without any one remark upon them.

printed thick, which I did not think worth troubling the reader with, except as to their substance; suffice to say then, that the action appears to have been, 'in trespass for impounding cattle, and continuing them so impounded till some person let them out.' I have purposely chosen rather to take for example a case which has already happened, and to select it from an able reporter, than to give any one of my own contrivance.

1. *Declaration, as it would be drawn according to our Form.*

[*Devonshire, to wit.*] *Thomas Chope, gentleman, complains of John and Peter Heard being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, for a plea of trespass upon the property of the said Thomas, by unjustly impounding twelve of his sheep, on the 12th day of December, in the year of our Lord 1754, at Nottacot, in the parish of Hartland, and continuing them thus unjustly impounded, till some person let them out, whereby they were lost. To the damage of the said Thomas of 100l.*

2. *Of the Plea.*

Mr. *Morgan* in his precedents has pleaded first, the general issue; and 2d, that the cattle were doing damage, wherefore the defendants impounded them. But as to the first (26) plea, I see no reason
whatever

(26) Pleading double is what in no case I approve. In the first place I think it rather confuses the cause; in the next, you put your client to the expense of moving the court, which might as well be saved; for there is never any danger but the costs will always be high enough of themselves, consequently there is no
necessity

whatever for it; we shall therefore reject it, and plead only the second, continuing of course our new form.

" And the said *John* and *Peter* say, that the said *Thomas* ought not to maintain his action, *because they found the said sheep grazing in the meadow of the said John, called Nottarot Higher Moor, or the higher moor situate in the said parish of Hartland; wherefore the said John in his own right, and the said Peter as his servant, impounded the said sheep, as by law they had a right to do.* And this they are ready to verify.

necessity for increasing them by artificial means. Now of what use can it be to deny the whole of the declaration in one plea, and then confess a part in the next? For here the general issue denies the taking the cattle originally, which the next plea not only avows, but justifies. The reader will therefore no doubt agree with me, that the last plea is quite sufficient, without its being preceded by any other. Besides the pleading the general issue first, and a special plea next, seems *contrary to the rule* laid down by Judge *Blackstone*, when he explains the nature of defence, V. III. p. 297. It would be ridiculous, he observes, to suppose that the defendant comes and defends; or in the vulgar acceptation *justifies*, the wrong and injury in the one line, and pleads he is *not* guilty of the trespass in the next. But to illustrate the absurdity of pleading double by example, let us examine the import of the pleas under our consideration.

The first of which imported, that the defendants did not take the sheep, and consequently did not impound them;

The second, that they did take the sheep, and they assign a reason for so doing.

The whole of which then amounts to this. *We did take your sheep, and we did not take your sheep.* Now, had the question been distinctly put to these poor clowns in *person*; could they have made a more inconsistent answer for themselves, than their special pleader made for them? Could they have pleaded more inconsistently? Nay, had the question been *even put* to the *sheep*, had the poor animals had the gift of speech, could they have made a less rational answer, *than we did, and we did not.*

3. *Replication.*

To which the said *Thomas* saith in reply, that the hedges which separate the close of the said *John* from the lands of the said *Thomas* being out of repair, the sheep escaped through the breaches, which said hedges it was the duty of the said *John* to have kept in repair; for had he so done, the sheep would have been prevented from getting into his close. And this the said *Thomas* is ready to verify.

4. *Rejoinder.*

And the said *John* and *Peter* in rejoinder admit, that the said *John* was liable to keep the said hedges in repair; and therefore the said *John* always did so; but the said *Thomas* set fire to the same, which caused the breaches above-mentioned. And this the said *John* and *Peter* are ready to verify.

“The whole matter, the reader will now observe, seems to be reduced to this single question, namely, *who caused these breaches in the hedges.* The defendants say, that the plaintiff set fire to the hedge; if so, it was no doubt his own misconduct that lost him his sheep: but the readiest way to determine the truth seems to be, to negative that fact; *i. e.* to plead the general issue in sur-rejoinder, as to that particular. But, according to Mr. *Morgan's* precedents, a traverse is pleaded, wherein the plaintiff's special pleader makes him say, as he had said before; and the defendants thereupon take issue; whereby their special pleader makes them say as they had said before. To prevent however this repetition, we shall beg leave to plead the general issue at once, without any further ceremony; always continuing our example according to our shorter method proposed.”

5. *Sur-*

5. *Sur-rejoinder.*

And the said *Thomas* in sur-rejoinder, *denies* that he set fire to the hedges. And of this he puts himself upon the country.

“ Thus then it seems the plain and intelligible mode of pleading here proposed, is equally applicable to special pleas, as to declarations and general issues; reserving no other form than that of mentioning the name of the plea in its commencement, and distinguishing it by its conclusion; the body of it always containing the *simple fact as it happened*, stated in as few words as possible.”

CHAPTER V.

Of ARRESTS.

THE law with regard to arrests, I would leave in a great measure as it now stands; for to abolish them might be extremely pernicious in a commercial country; but I would nevertheless *abolish the writ*, for which there is not the smallest occasion. It is enough that the plaintiff before the proper officer make an affidavit of his debt, and thereon let the sheriff issue his warrant to apprehend the defendant; for the continuation of the writ, independent of its making the plaintiff run a further risk, only adds to the poor debtor's misfortune in the spunging-house; he has so much the more to pay before he can be liberated: nay, perhaps on account of that additional sum he is obliged to go to a jail, and

and thence the creditor is perhaps deprived of the whole of his debt. For thus reasons the unhappy man! "Since such rapacity exists, that I must be so charged; since I must suffer the same imprisonment for part as for the whole; I had better keep the money to feed me when I am locked up! when hungry and in prison, that *no man will visit me.*"

But though I would not abolish arrests, the reader I hope will not think me a friend to them, according to the present practice. No, I would regulate them: for, instead of the plaintiff's having till the end of the term after that in which process is returnable to declare in, he should have no more than six days; and according to the plan which I laid down above, it is impossible that a longer time could be necessary to draw any declaration whatever in. After issue is joined, then with six days more let the plaintiff give notice of trial.

My reasons for these proposals are, that as the law stands at present, the plaintiff having two terms to declare in, *a man may lie half a year in jail before he knows the particulars on which he is detained;* and then, after issue is joined, the plaintiff has two terms (27) more, before he is obliged to give notice of trial. These together make one year, without reckoning the time taken up in pleading; so that we may fairly say, a man may be detained in a jail, whose circumstances are so low that he cannot find bail, a good year and a quarter, before a court of justice may be called upon *determine, whether or not, be owed the plaintiff a farthing at the time of the arrest made.*

(27) But in *C. P.* if issue be joined early enough, notice must be given the same term. See p. 34.

Judgment by Default.

It is unnecessary to observe any thing under this head, except that let the alterations proposed for regulating the other parts of practice, be extended to this by analogy.

CHAPTER VI.

Of B A I L.

AS to bail, I would have the proceedings against them reduced to those of a common action *notailable*; abolishing that *abstruse philosophy*, of *two nothings making a something*; and instead of their becoming security at first, for the appearance of the defendant upon the return of the writ; they should become bound for his appearance that he might be charged in execution. By this means the trouble and expense of putting in bail above would be saved; and many innocent people would not then become fixed; besides, if giving bail *once* will answer the purpose, *why give bail twice?*

Note. By the adoption of this mode of arrest and bail, all the advantages of them would be preserved; whereas their inconveniences would be chiefly, if not *totally* removed.

CHAPTER VII.

Of ERROR.

WITH respect to this, I would have every proceeding abolished, except the assignment of errors; and that should be reduced to the same rules as demurrer, with this difference however, *that leave of the court be first obtained*, the same as for a new trial or arrest of judgment, to argue certain errors pointed out in the proceedings. But where a new trial had been before had, and a second jury had given a verdict in favour of the same party as the first, there I would not on any account have any writ of error granted; as *no judge or judges ought in any case to have the power of reversing the verdicts of two juries.*

“Error hath many ways, and truth but one!”

POPE.

Note. Did the unhappy client know, that instead of his cause being wholly to be reheard, as he imagines; it is only a *quibble at law* that is to be decided; as, ‘whether the action being trespass ought not to have been case:’ and though right in substance and truth, he may be condemned for being wrong in form; and that *form* at the same time, a *ridiculous one*; he would never bring a writ of error.’ Or were the legislature of the country properly informed, it could never hesitate to adopt the plan I propose.

CONCLUSION.

THUS did reason's comparing balance rule the whole, the pleadings might very easily be reduced into a very narrow compass indeed; and the rest of the proceedings abridged according to common sense. I shall therefore forbear to tire the patience of the reader, with giving any more examples of what might be done, flattering myself that from the manner in which the subject has been treated, I have at least gained one of the two points I had in view; *namely, that of making the present practice better understood.* So that, *if even the favour of reforming it should not be granted me, yet of the happiness of having made the present known, I cannot be deprived!!!*

However with regard to a reform, nothing surely could be more laudable, than *a plan for administering justice at a more easy expence*; because thereby, we should defend the property of the industrious, from the rapacity of the idle; we should protect the virtuous, from the attacks of the vicious; we should prevent the feeble, from being overpowered by the mighty; in short, we should give alms to the indigent, succour to the distressed, defence to the weak, and *virtue to the great!* But that a proposition of this kind coming from so obscure an individual, will be patronised by a whole nation, I am not so vain as to imagine: yet hope which springs eternal in the human breast, will not let me totally banish the idea; and when we hope for the benefit of the unfortunate, to cherish such a hope is surely praiseworthy!

In the first place then, to accomplish this desirable end, in addition to the mode of proceeding that

that I have just now laid down, I propose the abolition of all court fees, not only those paid in court, but also those paid at the judges' chambers; and in order to render the judges totally independent, an augmentation of 1600*l.* a year to each of their salaries, so that no judge would then enjoy less than 4000*l.* a year.

As to the officers of the courts, from the highest to the lowest of them, I propose to increase their salaries in proportion to the loss of their perquisites; and *the first man who then took a fee*, the matter being proved, he should be immediately dismissed, and fined three years salary. This would at once remove all inconveniences arising from insolence of office, as it would then be to the interest of all persons filling departments in the courts of justice, to behave like gentlemen, instead of receiving fees like footmen and coffee-house waiters, 'Jobu, keep the two-pence.' If however, on account of such reform, any offices should be rendered totally useless, I would *not* have those people who now fill them, abandoned to fortune and the wide world; but their salaries, or salaries equal to what their perquisites now are, continued to them for life: for my disposition and intention are to do good to all men, but do injury to none; 'the basis of civilization appearing to me to be *universal charity*.'

"If it be objected to this part of my plan, that
 "it would be an additional expense to government,
 "I pledge myself *to lay a plan before the Public to*
 "*accomplish so desirable an end*, without laying one
 "additional burthen upon the subject, but on the
 "contrary *to ease him of many*."

We shall now proceed to make out our bill of costs in the cause of the watch-maker, which according to the present practice would most probably have been about 30*l.* but according to our plan of reform, the trial of such a cause would be less than

10 $\frac{1}{2}$ and yet the profit of the attorney would be 4 $\frac{1}{2}$ out of 5 $\frac{1}{2}$.

	Out of the Attorney's Pocket.		
	£.	s.	d.
Retainer and taking in- structions -	0	4	4
Drawing declaration (28)	0	5	0
Copy and service -	0	5	0
Stamp (29)	0	5	0
	0	19	4
	0	7	7

(28) I put 5 s. because this is the sum now allowed for filling up process, and there would be no more trouble in filling up the blanks in the declaration I propose, than in filling up those in a common writ and copy, as printed forms might be kept at the stationers; however, in cases where by the length of the plaintiff's bill, the declaration must needs be longer than ordinary, let the attorney charge 1 s. a folio drawing, and 4 d. copying, as at present; supposing the common length to prevent mistakes to be four *items*. Here the reader will observe that every *item* would make a different count, consequently, his declaration would contain just as many counts as reason directed, and no more; and with this additional advantage too, that the demand of an upright man could not then be confused by the *ignorance of a special pleader*. Judge *Blackstone* lamented that young men too often received the elements of their legal education, at the desk of an attorney; had he now been living, he would have lamented much more, the confined ideas that men of otherwise good parts, imbibe in the office of a special pleader. "Were I to define special pleading, I should call it, sublimatum of nonsense."

(29) I have said 5 s. although the stamp on process is now only *half-a-crown*, but then the treble penny stamps for the declaration would not be used; however, this additional 2 s. 6 d. will more than doubly supply that deficiency, consequently, the revenue would not be hurt.

Drawing

CONCLUSION.

	£.	s.	d.	£.	s.	d.
Brought forward	0	19	4	0	7	7
Drawing issue and notice of trial, with copy and service	0	2	6	0	0	0
Drawing briefs, two brief sheets (30)	0	13	4	0	0	0
Two copies of ditto	0	13	4	0	0	0
Engrossing record (31)	0	3	4	0	0	0
Entering the cause for trial	0	3	4	0	0	0
One subpoena (32)	0	7	0	0	2	7
Four tickets	0	4	0	0	0	2
Service on four witnesses	0	10	0	0	0	0
Conduct money, 1s. each	0	4	0	0	4	0
Fee to the senior counsel	2	2	0			
To his clerk	0	2	6	0	14	4
Fee to junior counsel	1	1	0			
His clerk	0	2	6			
Attending counsel	0	6	8			
Attending the court upon the trial of the cause (33)	0	13	4			
	£.	8	8	2		

(30) In common cases, the brief would never exceed this length, and frequently one sheet would be sufficient.

(31) This is allowing a third of the drawing the pleadings.

(32) Four witnesses may be named in one subpoena, and more are seldom necessary in common cases, often a less number.

(33) But if for more than one day, add 6s. 8d. for every day after the first.

CONCLUSION.

333

Brought forward	8	8	2
Jury	0	12	0
Stamp for poſtea (34)	0	10	0
	£	9	10 2 (35)

Now to prove the poſition that the attorney would then have a profit of 4*l.* out of 5*l.* we muſt firſt deduct from the groſs amount 4*l.* 10*s.* being the amount of counſel's fees, jury and ſtamp for poſtea, which every one knows the attorney always receives of his client as ſoon as iſſue is joined; or at leaſt, ſuch is the general cuſtom, and I believe a great many receive much more than is neceſſary for theſe expenſes; let it however be recollected though; that *at preſent they have the record to paſs, and court fees to pay,* 'charges which by my ſyſtem would be wholly aboliſhed,' for *Magna Charta* ſays, "We will ſell to no man; we will deny to no man, nor will we defer to any man either juſtice or right."

It ſeems therefore very clear to me, that *all court fees*, and unneceſſary expenſes of any kind whatever, are *obſtacles in the way of juſtice*, not intended by the principles of our excellent conſtitution. And to

(34) The ſtamp on poſtea at preſent, is only 5*s.* and 5*s.* prior on the record; but I would have the whole on the poſtea, becauſe when by the non-attendance of a witneſs, or other unforeſeen accident, the plaintiff is non-ſuited; the poſtea ſhould not be ſtamped at all, as it is unfortunate enough for a man to be obliged to bring a ſecond action for the ſame cauſe, and pay coſts in the firſt, without having an additional tax laid upon him. Beſides this indulgence would the better enable him to proceed aſreſs, indeed I think myſelf, all the proceedings ſhould be *reſtamped gratis*.

(35) I mentioned 10*l.* in the title page, merely by way of uſing round numbers.

preſerve

preserve that constitution; *the only effectual mode unquestionably is, 'to reduce the heavy expense attendant on legal proceedings.'* Though some persons may say, no matter how heavy the expense of going to law is, but let it be recollected, *that those who reason that way, have no property to lose; or if they have any, they have not enjoyed it long; for so long as men continue to possess property, so long will they continue to dispute concerning it.*

The only effectual means to make the people of these commercial kingdoms comfortable and happy, is to adopt a plan by which their differences may be terminated in the easiest, least complicated, and most reasonable manner. It is a duty which we owe to God and our neighbour; in fine, it is a duty we owe to ourselves. "*Moral honesty is not a mystery,*" though *special pleading* is an imposition upon common sense.

Law was not designed as the trumpet of war, but the symbol of peace, which latter we have commonly painted in our courts of justice. The greatest blessings springing from liberty is, that when two citizens have a difference, they may without difficulty have recourse to the arbitration of a jury of their countrymen; but when the expense is more than the generality can afford, the blessing of liberty is *not* enjoyed.

But I have digressed a little, let us therefore return; we have seen the sum to be deducted from the gross amount, as being money paid by the client, (36) to be 4*l.* 10*s.* consequently, the remainder is 5*l.* 0*s.* 2*d.* Now the actual money which the attorney would be out of pocket, would

(36) If the attorney furnished this money, let him be allowed three shillings in the pound commission on it, though I think every client to blame that does not furnish it *himself*, even independent of the charge I propose,

bc

be only 24s. 6d. but as other incidental expenses may occur; to be liberal, we will call the money out of pocket twenty shillings; here then, notwithstanding the great reduction of the costs, is yet a profit left to the attorney of 400 *per cent.* and that too upon a very simple return; for in no *civilized* country ought a plaintiff's bill of costs in a common action *not* bailable to exceed 10*l.* but at present, although you employ the honestest attorney that was ever admitted to practise in a court of justice, you will seldom find your bill as plaintiff less than 30*l.* hence it is clear, it is not the men, but the system wants reform; and that man who asserts that the present practice is good, *either does not understand it, or if he do, he is an enemy to the liberties of mankind.*

I have no doubt however but the meanest of the lower order of the profession, will take every opportunity of vilifying the whole of this publication: in such case, I would advise my reader to ask one of those gentry, whether he has read the work, and if he answer in the affirmative, then ask him what it contains? and if he do not give such an account of it, as a person has reason to expect from a professional man, conclude at once that man is a *fool*? not fit for his employment, and whose only knowledge is the *art of running up a long bill*; an art universally known by the advocates for imposition.

We shall now proceed according to our plan for a reform to make out the bill of costs of the defendant, and therein we shall not proceed farther than *trial*; for the expense of execution, I would have in all cases fall upon the losing party; besides in estimating the plaintiff's costs, as the practice now stands, at 30*l.* and those of the defendant at about 14 or 15*l.* nothing is considered with regard to execution; for by paying the debt and costs before the expiration of the four days, to move for arrest

arrest of judgment or new trial, the losing party may then avert that expense, which if he cannot do by not having the money to satisfy the claim of his adversary, the mode I have pointed out is a very mild and merciful one of carrying the judgment of the law into effect, calculated to indulge the debtor, while at the same time it gives ample security and recompense to the creditor.

Defendant's Bill of Costs.

	Out of the Attorney's Pocket.		
	£.	s.	d.
Retainer and taking in- structions	0	4	4
Searching, if declaration filed	0	3	4
Copy of the substance (37) thereof	0	2	6
Drawing and engrossing general issue	0	2	6
Copy of the issue, and notice of trial	0	1	0
One subpoena	0	7	0
Four tickets	0	4	0
Service on four witnesses	0	10	0
Conduct money	0	4	0
	£. 1	18	8
	£. 0	9	7

(37) I mean merely the items charged for the client to look over.

(38) This is for the treble-penny stamp, on which the plea is engrossed.

Drawing

	£.	s.	d.	£.	s.	d.
Brought forward	1	16	8	0	9	7
Drawing brief, two sheets	0	13	4	0	0	0
One copy for counsel	0	6	8	0	0	0
Fee to counsel	-	2	2	0	0	0
His clerk	-	0	2	0	9	7
Attending counsel	-	0	3	4		
Attending the court when cause tried	-	0	13	4		
				5	17	10

The money which in a defence the attorney ought to receive from his client before trial, ought merely to be the fee of the counsel and his clerk, which according to our example is 2*l.* 4*s.* 6*d.* this deducted from 5*l.* 17*s.* 10*d.* the gross amount, leaves the balance or attorney's charge 3*l.* 12*l.* 4*d.* which he would return for laying out only 9*s.* and 7*d.* Thus if I allowed a considerable profit to the plaintiff's attorney, I have not been less liberal to that of the defendant. Now is there a man of common understanding in the kingdom, who will attempt to affirm that the profit above allowed, is not ample for any honest man to receive. Some of the lower class of attornies may indeed say, there are some items ought *not* to be omitted, such as a charge for making out the bill, &c. but all those I meant to omit, for God forbid! that such an imposition as a charge for making out the bill should have my sanction; that of the *public* I am sure it never had; and though many industrious and respectable clients have been obliged to pay it, it has been because there was no law to relieve them against it. The time however, when there will be one to relieve suitors from that and all other imposing charges whatever, I predict is not far distant. I rely greatly

Z

upon

upon the humanity of parliament, whose goodness I hope will give the present *round-about* practice an early consideration.

Thus what applies to an action for work and labour, equally does to another, and the like of goods sold and delivered, &c. The expense also of applying to the court by motion would be reduced in proportion, for as the court fees would be abolished, the parties would save the heavy charge of office copies, which they would receive gratis; nor would affidavits then be so enormously long as at present, on account of the other proceedings being reduced within the proper bounds of reason. Thus the administration of justice would be universally facilitated.

But I have yet another remark to make as to the plan proposed, with regard to attesting the execution of deeds or the signature of promissory notes and bills of exchange, before a magistrate (39) in the town, wherein the witness resides: a copy of such deposition being served on the defendant's attorney, at the time of the service of notice of trial. This *method*, which every reasonable man must allow would be full as safe in all respects, as at present, *would frequently prevent costs exceeding 10l.* which would otherwise amount to 50 or 60*l.* and a mode of doing of business too, much more certain; for it is not unusual to fetch a witness some hundred miles, and maintain him a week or two in town only to prove a hand-writing, and perhaps the moment he is wanted he is out of the way, and the plaintiff nonsuited on account of his absence. You have your remedy against him it may be said, but will that remedy be an antidote to your disease; if you must go to *jail* because you are unable to pay your adversary's heavy costs, although your witness

(39) See Evidence, p. 225.

be not in circumstances to re-imburse *you*. Now by my plan, the execution of the instrument being attested previous to the trial, no mischief could result from the witness being out of the way.

Independent too of the reduction of the costs, considerable advantage would result from the jury being able to understand the declaration and plea, and consequently the premises upon which they founded their verdict; but this at present they do not, for tell me what jurymen are there who can at all comprehend a declaration of any kind whatever, according to the present plan of drawing one, of which that my reader may fully convince himself, let him examine the one for the watchmaker's bill, *p.* 18. and then let him examine the one for the same cause, according to my plan for a reform, *p.* 304; when let him clap his hand upon his heart, and examining his own conscience, let him declare upon which he would rather try a cause, and to which he could understand the evidence best to apply. Judge *Blackstone* in his introduction, observes, "The ignorance of some of our best juries, has thrown more power into the hands of the judges to direct, control, and even reverse their verdicts than ever the constitution intended;" and he might have added that what their own ignorance did not accomplish, the *arts* of special pleading have taken care to complete. A very excellent author that I have somewhere read, observes, "That it has been the characteristic of some people to *explain the most difficult cases, while it has been that of others to perplex the most simple.*" This has been the universal study of practical lawyers; but still it is not the fault of the men, *it is the fault of the measures* they are permitted to pursue. Render the system less difficult, and the men will be rendered honest. Let juries understand the record, and the proceedings will cease to perplex

perplex them. Let the language of pleading be plain, and the lawyers will be no longer able to puzzle them. In a word, let common sense take place, and the honest man's suit will be less liable to miscarry.

There is a maxim in the *English* law, that a judge cannot travel out of the record, and to be sure a very good maxim it is; but as records are now drawn, it would puzzle King *Solomon* himself; were he to rise from the dead, to know how the judge kept within it, so little resemblance has a declaration to the true matter of complaint; and if the evidence ultimately come within the circle of it, so that the judge does not exceed his bounds, I am sure to keep within them, he must travel with a compass, *for road there is none, any more than in the desarts of Arabia.*

I submit therefore once more to my reader, to compare my form of pleading with that which is in present use, and then let him say which he best understands.

British Legislators, convince the world of the excellency of your constitution, by *restoring* the rights of juries in a *reformation* of the practice of your courts! So shall the present age admire your integrity, and posterity remember your name with gratitude!

E. J. M.

F I N I S.